Supreme Court of the United States

OCTOBER TERM, 1963

No. 637

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

vs.

BURNUP AND SIMS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES' COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the Fifth Circuit		
Petition for enforcement of an order of the National Labor Relations Board	1	1
Order to file petition	3	3
Answer of respondent to petition for enforcement	4	4
Certified list of the National Labor Relations Board	5	5
Proceedings before the National Labor Relations Board	8	7
Charge against employer	8	7
Complaint and notice of hearing	13	12

	Original	Print
Proceedings before the National Labor Relations Board—Continued		
Answer	18	16
Letter requesting continuance for respondents, dated November 22, 1961	19	17
Letter declining request for continuance, dated November 27, 1961	21	19
Notice of intention to amend complaint	22	20
Notice of intention to amend complaint	24	21
Motion for reconsideration of continuance	25	22
Order denying motion for reconsideration of continuance	29	25
Letter requesting reconsideration of the Regional Director's refusal	30	26
Intermediate report and recommendations	33	28
Respondent's exception to intermediate report	51	42
Exceptions of the General Counsel to the Intermediate Report and Recommendation of the Trial Examiner and brief in support of exceptions	53	44
Decision and order	61	51
Appendix—Notice to All Employees	79	65
Transcript of hearing (excerpts), December 12, 1961	85	67
Appearances	85	67
Testimony of Samuel J. Casella—direct	87	69
—cross	88	70
Robert John Davis—direct	90	71
Testimony of Robert John Davis—cross	107	83
Offer in evidence	115	88
Testimony of Robert John Davis—redirect	121	91
Joseph H. Harmon—direct	125	94
Testimony of Joseph H. Harmon—cross	133	100
Motion to admit exhibits	140	105
Testimony of Joseph H. Harmon—redirect	141	105
—recross	149	110

	Original	Print
Proceedings before the National Labor Relations Board—Continued		
Transcript of hearing (excerpts), December 12, 1961—Continued		
Transcript of John Philip McKnight		
—direct	149	111
—cross	158	117
Sherman Earl Franks		
—direct	159	118
—cross	164	121
Testimony of Carl Moritz—direct	164	122
Motion to admit exhibit	170	126
Voir dire examination	173	128
Testimony of Carl Moritz—direct	173	128
—cross	186	135
—redirect	228	165
—recross	230	167
Testimony of Doyle Tawney—direct	239	173
Voir dire examination	247	179
Testimony of Doyle Tawney—cross	249	180
—redirect	273	196
—recross	274	197
Yvonne Burney—direct	277	199
Respondent's Exhibits:	279	201
No. 1—Letter from Burnup & Sims Inc. to Robert Davis, dated November 8, 1961	279	201
No. 2—Letter from Burnup & Sims Inc to Joseph Harmon, dated November 8, 1961	280	202
No. 4—Letter from Russell J. Burnup to Carl Moritz, dated September 13, 1961	281	203
No. 5—Letter from Russell J. Burnup to Carl Moritz, dated September 22, 1961	283	204
No. 7—Affidavit of Lyle Pate, dated October 25, 1961	285	206
Minute entry of argument and submission (omitted in printing)	287	207
Opinion, Jones, J.	288	208
Motion to modify proposed decree	305	220
Appendix—Notice to All Employees	308	223

	Original	Print
Petitioner's reply to respondent's motion to modify proposed decree	310	224
Order denying motion to modify proposed decree	313	226
Decree	314	227
Appendix—Notice to All Employees	317	229
Clerk's certificate (omitted in printing)	318	230
Order allowing certiorari	319	231

[fol. 1] [File Endorsement Omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20,117

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

BURNUP AND SIMS, INC., RESPONDENT

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—November 5, 1962

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondent, Burnup and Sims, Inc., its officers, agents, successors and assigns. Case No. 12-CA-2156.

In support of this petition the Board respectfully shows:

(1) Respondent is engaged in business in the State of [fol. 2] Florida, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on June 25, 1962, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors

and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, and pursuant to Rule 38(1) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony, and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, [fol. 3] and requiring Respondent, its officers, agents, successors and assigns, to comply therewith.

/s/ Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR
RELATIONS BOARD

Dated at Washington, D. C. this 5 day of Nov., 1962

IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ORDER TO FILE PETITION

* * * *

A Petition for Enforcement of an Order of the National Labor Relations Board made June 25, 1962 in the proceeding known upon the record of the Board as Case No. 12-CA-2156 having been presented to this Court;

IT IS ORDERED that said Petition be filed and the case docketed as of November 7, 1962.

IT IS FURTHER ORDERED that the National Labor Relations Board file with the Clerk, a certified copy of the transcript of proceedings, or in lieu thereof, a certified list of all the documents, transcripts of testimony, exhibits and other material comprising the record of the proceeding before the National Labor Relations Board, in [fol. 4] the above entitled matter, within forty days from this date as required by Rule 38, as amended.

EDWARD W. WADSWORTH
CLERK OF THE UNITED
STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

/s/ Clara R. James
Chief Deputy Clerk

IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ANSWER OF RESPONDENT TO PETITION FOR ENFORCEMENT

* * * *

Comes now BURNUP AND SIMS, INC., through its counsel, and in answer to the Petition For Enforcement of an Order of the National Labor Relations Board, filed herein, states:

1.

Respondent admits the allegations contained in paragraphs numbered 1 and 2 of the Petition, except it denies that any unfair labor practices occurred.

2.

Respondent lacks sufficient knowledge to either admit or deny the allegations in paragraph numbered 3 of the Petition.

[fol. 5]

3.

For further answer, respondent states that the order of the National Labor Relations Board for which enforcement is ought is based upon erroneous findings of fact and erroneous conclusions of law, and is contrary to the facts and the law.

WHEREFORE, respondent prays this honorable Court that enforcement of the Order be denied and that the Petition be dismissed.

FISHER & PHILLIPS
(Signed) By Ray C. Muller
RAY C. MULLER
Counsel for Respondent,
Burnup and Sims, Inc.

26 Pryor Street, N.E.
Atlanta 3, Georgia

* * * *

IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFIED LIST OF THE NATIONAL LABOR RELATIONS BOARD

* * * *

The National Labor Relations Board by its Executive Secretary, duly authorized by Section 102.116, Rules and Regulations of the National Labor Relations Board—[fol. 6] Series 8, hereby certifies that the list set forth below constitutes a full and accurate transcript of the entire record of a proceeding had before said Board and known upon its records as Case No. 12-CA-2156. Such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

VOLUME I—Exhibits introduced into evidence, also rejected exhibits: [1]

GENERAL COUNSEL'S EXHIBITS:

1-A thru 1-N [2]
2 and 3

RESPONDENT'S EXHIBITS:

1 thru 5
7
8 (rejected)

VOLUME II — *CERTIFIED RECORD*

Stenographic transcript of testimony taken before Trial Examiner Albert P. Wheatley, on December 12, 13 and 14, 1961 ..... 1 - 768

---

[1] Respondent's Exhibits 6-A thru 6-F were identified only, hence are not a part of the record.

[2] General Counsel's Exhibits 1-A, 1-B, 1-C, 1-E, 1-F, 1-G, 1-H, 1-I, 1-M, 1-J and 1-K are contained in Volume III, Pleadings of the Certified Record.

[fol. 7]

VOLUME III—Pleadings *CERTIFIED RECORD*

1. Copy of Trial Examiner Albert P. Wheatley's Intermediate Report and Recommendations dated February 13, 1962..... 1 - 9
2. Copy of Respondent's exceptions to the Intermediate Report received March 7, 1962.. 1 - 2
3. Copy of General Counsel's exceptions to the Intermediate Report and Recommendations received March 8, 1962..... 1 - 26
4. Copy of Decision and Order issued by the National Labor Relations Board, dated June 25, 1962..... 1 - 14

IN TESTIMONY WHEREOF, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 12th day of December 1962.

/s/ Ogden W. Fields
Executive Secretary
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

[fol. 8]

* * * *

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER—October 3, 1961

INSTRUCTIONS: File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No.
12-CA-2156

Date Filed
October 3, 1961

1. Employer Against Whom Charge Is Brought

Name of Employer
Burnup & Sims of Melbourne, Inc.

Number of Workers Employed
Approx. 39

Address of Establishment (Street and number, city, zone, and State)
Babcock and North Streets
Melbourne, Florida

Type of Establishment (Factory, mine, wholesale., etc.)
Manufacturer and supplier

[fol. 9] Identify principal product or service
Cement blocks and ready-mix concrete

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) of the National Labor

(List subsections)

Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

On or about September 29, 1961, the above-named employer, by its officers and agents, terminated the employment of Robert J. Davis and Joseph H. Harmon, ready-mix truck drivers, and John P. McKnight, a dump truck-driver, because of their membership and activities in behalf of Local Union No. 172 Airline Supply Technicians affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, a labor organization, and for engaging in other protected, concerted activity, and at all times since such date, the above-named employees.

By the acts set forth in the above paragraph, and by other acts and conduct, the said employer, by its officers and agents, has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

[fol. 10]

3. Full Name of Party Filing Charge (if labor organization, give full name, including local name and number)

Robert J. Davis

4. Address (Street and number, city, zone, and State)

819 King Richard Road, Eau Gallie, Florida

Telephone No.

AL 42027

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

6. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

(Signed) By: Robert J. Davis
(Signature of representative or person filing charge)
ROBERT J. DAVIS

An Individual
(Title, if any)

October 8, 1961
(Date)

Willfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 1001)

[fol. 11]

file copy

Re: Case No. 12-CA-2156
October 4, 1961

Burnup & Sims of Melbourne, Inc.
Babcock and North Streets
Melbourne, Florida

Gentlemen:

This is to inform you that a charge, a true copy of which is enclosed, was filed in the above-entitled matter by the representative or person shown in the "DECLARATION" of the charge, alleging that an unfair labor practice has been committed in violation of the Labor Management Relations Act.

The staff member to whom the case has been assigned will contact you at some time during the investigation of this matter. Please cooperate with him so that all facts of the case may be considered.

I would appreciate receiving from you promptly a full and complete written account of the facts and a statement of your position in respect to the allegations set forth in the charge.

Please address any correspondence directly to this office, referring to the case number shown above. Furthermore, should you find it necessary to place a *long distance* phone call to our office in connection with this matter, will you please tell the operator you wish to talk with the Board [fol. 12] Agent handling this particular case, and give her the case name and number.

Yours very truly,

(Signed) By: Harold A. Boire
HAROLD A. BOIRE
Regional Director

ATTN: CHARGING PARTY

If you have not yet done so, please submit to this office evidence supporting your charge.

Enclosure

REGISTERED MAIL
RETURN RECEIPT REQUESTED

CC: Robert J. Davis, 819 King Richard Road, Eau Gallie, Florida.
Frank E. Hamilton, Jr., Esq., 308 Tampa St., Tampa, Florida.

hp

I certify that I served the above referred to charge this day by postpaid registered mail on the addressee named above, together with a transmittal letter of which this is a true copy.

(Signed) By: Dora J. Shirah

[fol. 13] Subscribed and sworn to before me this 5 day of Oct., 1961.

(Signed) By: Letha H. Maxwell
Designated Agent

(Return Receipt Omitted)

BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMPLAINT AND NOTICE OF HEARING—November 8, 1961

* * * *

It having been charged by ROBERT J. DAVIS, an individual, that BURNUP & SIMS OF MELBOURNE, INC., herein called the Respondent, has engaged in, and is engaging, in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for the Twelfth Region, pursuant to Section 10 (b) of the Act and the Board's Rules and Regulations—Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1.

The charge was filed by Robert J. Davis on October 3, 1961, and a copy thereof was duly served on Respondent by registered mail on October 5, 1961.

[fol. 14]

2.

(a) Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of the laws of the State of Florida.

(b) Respondent, at all times material herein, has maintained its principal office in West Palm Beach, Florida, and does maintain plants in Melbourne, Eau Gallie and Cocoa, Florida, where it is engaged in the manufacture, sale and installation of concrete, concrete blocks, ready-mix concrete and other related products.

3.

(a) Respondent, in the course and conduct of its business operations, during the past 12 months, did purchase and receive goods and materials valued in excess of $50,000 directly from states of the United States other than the State of Florida.

(b) Respondent, in the course and conduct of its business operations, during the past 12 months, did perform services directly for an employer who in turn is an instrumentality of commerce and is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act, such service being valued in excess of $50,000.

4.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

[fol. 15]

5.

Local Union No. 172, Airline Supply Technicians, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, is, and has been at all times material herein, a labor organization within the meaning of Section 2 (5) of the Act.

6.

Respondent, by Manager Carl H. Moritz, its officer and agent, on or about September 29, 1961, terminated the employment of its employees Robert J. Davis, Joseph H. Harmon and John P. McKnight.

7.

Since on or about September 29, 1961, and at all times since, Respondent has failed and refused, and continues to fail and refuse, to reinstate the said employees named in paragraph 6 above to their former or substantially equivalent positions of employment.

8.

Respondent did terminate and failed and refused and continues to fail and refuse to reinstate the employees named above in paragraph 6 because said employees joined or assisted the Union or engaged in other union activity or concerted activities for the purpose of collective bargaining or mutual aid or protection.

[fol. 16] 9.

By the acts described above in paragraphs 6 and 7, for the reasons set forth in paragraph 8, and by each of said acts, Respondent did discriminate and is discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and Respondent thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8 (a) (3) and (1) and Section 2 (6) and (7) of the Act.

10.

The acts of Respondent described above in paragraphs 6 and 7, for the reasons set forth in paragraph 8, occurring in connection with the operations of Respondent described in paragraphs 2 and 3 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

11.

The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 12th day of December, 1961, at 9:30 a.m., EST, in the Executive Room, Mayfair Cafeteria, North Atlantic Avenue, Cocoa Beach, [fol. 17] Florida, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to said Complaint within ten (10) days from

the service thereof and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Respondent shall immediately serve a copy of the answer, as required by the above sections of the Rules, on each of the other parties.

DATED AT Tampa, Florida, this 8th day of November, 1961.

(Signed) By: Harold A. Boire,
HAROLD A. BOIRE,
Regional Director
National Labor Relations Board
Twelfth Region
112 East Cass Street
Tampa 2, Florida

(SEAL)

[fol. 18]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ANSWER

* * * * *

Comes now BURNUP & SIMS OF MELBOURNE, INC., through its counsel, Fisher & Phillips, and within the time as prescribed by Section 102.20 National Labor Relations Board Rules and Regulations, Series 8, files this Answer.

1.

Paragraphs 1, 2, 3 & 4 of the complaint are admitted.

2.

The Respondent is without sufficient knowledge to admit or deny Paragraph 5 of the complaint.

3.

Paragraphs 6, 7, 8, 9, 10 & 11 of the complaint are denied.

WHEREFORE, having fully answered the complaint, the Respondent respectfully requests that it be dismissed.

FISHER & PHILLIPS
(Signed) By: Ray C. Muller
Attorneys for Respondent

26 Pryor Street, N.E.
Atlanta 3, Georgia

[fol. 19]

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Answer to be served upon the following this 16th day of November 15, 1961, by depositing same in the U. S. Mail, postage prepaid:

Robert J. Davis
819 King Richard Road
Eau Gallie, Florida
(Signed) By: Ray C. Muller
of Counsel

BB/bs

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LETTER REQUESTING CONTINUANCE FOR RESPONDENTS—
November 22, 1961

Law Offices
FISHER & PHILLIPS
Pryor Building
26 Pryor Street, N. E.

Jackson 1-8586
Atlanta 3, Georgia

November 22, 1961

Mr. Harold A. Boire,
Regional Director
National Labor Relations Board
Ross Building
112 East Cass Street
Tampa 2, Florida
[fol. 20]

Re: Burnup & Sims
12-CA-2156

Dear Mr. Boire:

The above entitled matter is presently scheduled for hearing before a Trial Examiner on December 12, 1961.

Respondent requests a 20 day continuance to January 2, 1961.

As you are aware, the Allure Shoe "C" case at Miami begins December 4th, and that case could easily last for two weeks. Even should the Allure case conclude in one week, the remaining time available to prepare for hearing in Burnup & Sims would be wholly inadequate. Added to this problem is the anticipated Burnup & Sims election during this same period.

Being of the opinion that you agree with me in the proposition that respondent counsel be given the same consideration as general counsel in the matter of continuances, I will suggest that the complaint in this matter is recently issued, that respondent is here asking for a single continuance, and that much more lengthly and repeated continuances have been granted to general counsel in other cases.

Your courtesy and consideration in this as in past matters will be sincerely appreciated.

Very truly yours,

(Signed) By: Ray C. Muller
RAY C. MULLER

[fol. 21] RCM/bs
cc: Frank Hamilton, Jr., Esq.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LETTER DECLINING REQUEST FOR CONTINUANCE—
November 27, 1961

NATIONAL LABOR RELATIONS BOARD
Twelfth Region
Ross Building, 112 East Cass Street, Tampa 2, Florida
Telephone 223-4623.

November 27, 1961

(SEAL)

Re: Burnup & Sims of
Melbourne, Inc.
Case No. 12-CA-2156

Ray C. Muller, Esq.
Fisher & Phillips
Pryor Building
26 Pryor Street, N. E.
Atlanta 3, Georgia

Dear Mr. Muller:

Replying to your letter of November 22, 1961, the Allure Shoe case is being postponed to January 15, 1962, so that [fol. 22] the reason for your request for continuance of the hearing in the above matter presumably no longer exists.

For this reason, I am declining your request.

Very truly yours,

NORMAN A. COLE
Acting Regional Director

cc: Frank E. Hamilton, Jr., Esq.
Hardee & Ott
308 Tampa Street
Tampa, Florida

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NOTICE OF INTENTION TO AMEND COMPLAINT

December 1, 1961

Re: Burnup & Sims of
Melbourne, Inc.
Case No. 12-CA-2156

Air Mail
Ray C. Muller, Esq.
Fisher & Phillips
Pryor Building
26 Pryor Street, N.E.
Atlanta 3, Georgia

Dear Mr. Muller:

Please take notice that the undersigned counsel for the [fol. 23] General Counsel intends to move at the opening of the hearing in this matter on December 12, 1961, that the complaint be amended to allege that John McKnight, presently named in the complaint as a discriminatory dischargee, was further discriminated against on or about November 23, 1961.

This constitutes formal notice.

Very truly yours,

FRANK J. KRUZICH
Attorney

1-73834
CERTIFIED MAIL
RETURN RECEIPT REQUESTED
MS/rim

(Return Receipts Omitted)

[fol. 24]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NOTICE OF INTENTION TO AMEND COMPLAINT

December 1, 1961

Re: Burnup & Sims of
Melbourne, Inc.
Case No. 12-CA-2156

Burnup & Sims of Melbourne, Inc.
Babcock and North Streets
Melbourne, Florida

Gentlemen:

Please take notice that the undersigned counsel for the General Counsel intends to move at the opening of the hearing in this matter on December 12, 1961, that the complaint be amended to allege that John McKnight, presently named in the complaint as a discriminatory dischargee, was further discriminated against on or about November 23, 1961.

This constitutes formal notice.

Very truly yours,

(Signed) By: Frank J. Kruzich
Attorney

1-73835—Certified Mail
Return Receipt Requested

MS/rim

(Return Receipts Omitted)

[fol. 25]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MOTION FOR RECONSIDERATION OF CONTINUANCE

* * * *

Comes now BURNUP & SIMS, INC., through its counsel, Fisher & Phillips, and moves the Regional Director, Twelfth Region, to reconsider the granting of a continuance of the above-entitled matter, and in support thereof shows:

1. That the charge in the above-styled case was filed, the complaint issued and answered, and the hearing date set for December 12, 1961.

2. That on or about December 2, 1961, counsel for the Employer received notice of the intention of the counsel for the General Counsel to amend the complaint at the hearing.

3. That in the case of Burnup & Sims, Inc., #12-RC-1315, the election date is set for December 15, 1961.

These facts considered, counsel for the Employer submits the following reasons for granting the continuance:

1.

THE NOTICE TO COUNSEL FOR THE EMPLOYER IS UNTIMELY.

Section 1004 of Title 5 of the U.S.C.A. (Administrative Procedure Act), states (a) persons entitled to notice [fol. 26] of an agency hearing shall be *timely* informed of (1) the time, place and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) *the matters of fact and law asserted . . . In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives* (emphasis added).

Normally, when a complaint is issued, the respondent has ten (10) days within which to answer, plus three (3)

days for mailing. In the present case, no such time may be taken. See *N.L.R.B.* v. *Kanmak*, 200 F. 2d 542 and *Brahy* v. *Federal Radio Commission*, 59 F. 2d 879.

2.

HOLDING THE HEARING ON DECEMBER 12, 1961, WHEN THE ELECTION IS SCHEDULED FOR DECEMBER 15, 1961, WILL GREATLY PREJUDICE THE POSITION OF THE EMPLOYER IN BOTH CASES.

In the "C" case, the employer *may not effectively investigate the merits of the complaint without subjecting* itself *to possible objections and a setting aside of the election in the "R" case.* Also, the activity of the "C" case hearing three (3) days prior to the election will create an atmosphere in which freedom of choice will be virtually impossible. Obviously, the Governmental agency activity, charging the employer with unfair labor practices, will prejudice the minds of the employees to such an extent that no vallid election could be held. This regardless of the merits of the complaint.

[fol. 27] The conducting of the hearing itself three (3) days prior to the election could possibly involve conduct which would result in the election being set aside. Surely, no thorough investigation of the complaint could be handled without an interrogation of the pertinent employee votes.

3.

THE REQUEST FOR RECONSIDERATION OF THE MOTION FOR CONTINUANCE IS REASONABLE SINCE IN THE PAST THE REGIONAL DIRECTOR HAS, ON HIS OWN MOTION AND OVER OBJECTION BY COUNSEL FOR THE RESPONDENT, CONTINUED THE HEARINGS IN "C" CASES. *I. E. ALLURE SHOE CORPORATION*, 12-CA-2074, 12-CA-2035, 12-CA-1993, 12-CA-2007, 12-CA-9293.

WHEREFORE, respondent Burnup & Sims, Inc. moves the Regional Director to reconsider its Motion for Contin-

uance in order to allow respondent to amply prepare its defense to the complaint and in order to hold the hearing at such a time that the atmosphere will be free from factors which would render free choice impossible.

FISHER & PHILLIPS
(Signed) By: Lynn C. Higby
Counsel for Respondent

26 Pryor Street, N. E.
Atlanta 3, Georgia

[fol. 28] CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of December, 1961, caused a copy of the foregoing Motion for Reconsideration of Continuance to be served upon the following individuals by depositing same in the U. S. Mail, postage prepaid:

George Bokat, Esquire
Chief Trial Examiner
National Labor Relations Board
Washington 25, D. C.

Mr. John McKnight
C/o General Delivery
Melbourne, Florida

Frank E. Hamilton, Jr., Esquire
308 Tampa Street
Tampa, Florida

(Signed) Lynn C. Higby
Of Counsel

LCH MS

[fol. 29]

* * * *

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Twelfth Region

Burnup and Sims of Melbourne, Inc.

and Case No. 12-CA-2156

Robert J. Davis, An Individual

ORDER DENYING MOTION FOR RECONSIDERATION OF CONTINUANCE—December 6, 1961

Respondent, through its counsel, having filed with the undersigned Regional Director a Motion for Reconsideration of Continuance of the hearing in the above matter;

And the undersigned having carefully considered the reasons advanced in support thereof, and having concluded that insufficient cause has been given;

IT IS ORDERED that the said Motion be, and the same hereby is, denied.

Dated at Tampa, Florida, this 6th day of December, 1961.

(SEAL)

(Signed) By: Harold A. Boire
HAROLD A. BOIRE,
Regional Director
National Labor Relations Board
Twelfth Region
112 East Cass Street
Tampa 2, Florida

[fol. 30]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LETTER REQUESTING RECONSIDERATION OF THE REGIONAL DIRECTOR'S REFUSAL

Law Offices
FISHER & PHILLIPS
Pryor Building
26 Pryor Street, N. E.
Jackson 3-8586
Atlanta 3, Georgia

December 7, 1961

National Labor Relations Board
Washington 25, D. C.

Attention:

Mr. Howard Kleeb
Associate Executive Secretary

Re: Burnup & Sims, Inc.
Case No. 12-CA-2156

Gentlemen:

This is an appeal from the Regional Director's refusal to grant a continuance of the hearing date in the above entitled matter.

Hearing before a Trial Examiner is scheduled for December 12, 1961. Contemporaneously with the *unfair labor practice hearing*, the Employer must prepare for an *election* which is scheduled for December 15, 1961.

[fol. 31] The unfair labor practice hearing immediately prior to the election—and probably during the election—will so prejudice the minds of the voters that a free choice is impossible. Beyond this, proper preparation for the hearing will be greatly hindered in that otherwise proper and legal interviews of witnesses may well result, under the circumstances, in conduct sufficient to set the election aside. The Employer is thus prejudiced in *both* the unfair labor practice case *and* the election.

Further, the unfair labor practice complaint is recent and current, in that *no* continuance has yet been granted to any party in the matter. As comparison, we refer the Board to the complaint from this Region in *Allure Shoe*, 12-CA-2007, et al, which is based on charges as ancient as February, 1961. The complaint in *Allure Shoe* issued August 25, 1961, setting hearing for September 25. Thereafter, the Region on its *own motion*, for its *own convenience*, and *over objection* of the Employer, (1) continued the hearing from September 25, to October 2; (2) continued the hearing from October 2, to October 9; (3) continued the hearing from October 9, to October 31; (4) continued the hearing from October 31, to December 4; (5) continued the hearing from December 4, to January 15.

When the Employer now asks for a *single* continuance for good cause — and not particularly for its personal scheduling problems — we are refused!

We submit that justice and basic fairness require the Board to direct a continuance in this matter. While this request could be made to the Trial Examiner at opening of the hearing, the time and expense to the government, [fol. 32] and to the Employer, in waiting to the "last minute", require and justify immediate action by the Board.

There is attached hereto the Employer's motion for reconsideration of the Regional Director's refusal, which the Regional Director denied yesterday, December 6, 1961.

The Board's courtesy and consideration in this, as in prior matters, will be sincerely appreciated.

Very truly yours,

FISHER & PHILLIPS
RAY C. MULLER
by Ray C. Muller

RCM:eb

cc: Harold A. Boire, Esquire
George Bokat, Esquire
Frank E. Hamilton, Jr., Esquire
Mr. John McKnight
Stuart Rothman, Esquire

Via Air Mail
Special Delivery

[fol. 33]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

IR-58-62
West Palm Beach, Fla

INTERMEDIATE REPORT AND RECOMMENDATIONS—
February 13, 1962

(Number and Title Omitted)[1]

Statement of the Case

Upon the basis of a charge filed October 3, 1961, a complaint in this matter issued on November 8, 1961, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act. The complaint is predicated on the discharge of three individuals (Robert J. Davis, Joseph H. Harmon, and John P. McKnight). On or about November 16, 1961, Burnup and Sims, Inc., Respondent herein, filed an answer denying that it had engaged in the unfair labor practices alleged. A hearing on the issues thus framed was held before me, Albert P. Wheatley, the duly designated Trial Examiner, in Cocoa Beach, Florida, on December 12, 13, and 14, 1961. At the close of the hearing the parties waived oral argument and announced intentions to file briefs. Thereafter (on January 22, 1962) Respondent filed a brief which I have considered in the preparation of this Report. No other briefs have been filed.

Upon the entire record and observations of witnesses I hereby make the following:

[fol. 34]

Findings and Conclusions

The Business Involved

Respondent maintains its principal office in West Palm Beach, Florida, and plants in Melbourne, Eau Gallie, and Cocoa, Florida, whefe it is engaged in the manufacture,

[1] The name appears as amended at the hearing.

sale and installation of concrete, concrete blocks, ready-mixed concrete and other related products.

Respondent admits that during the last 12 months it purchased and received goods and materials valued in excess of $50,000 directly from outside the State of Florida, and that during the same period it performed services valued in excess of $50,000 directly for an employer who is in turn an instrumentality of commerce and engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the foregoing facts, I find and conclude that Respondent is engaged in commerce or in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Labor Organization Involved

Local Union No. 172, Airline Supply Technicians, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, is a labar organization within the meaning of Section 2(5) of the Act.

[fol. 35]

Facts

Following the close of work on September 20, 1961, approximately 19 of the employees at Respondent's Melbourne plant (mostly truckdrivers) held a meeting in the vicinity of the plant and discussed wages. At this meeting, it was decided that the employees would seek a 15-cent per hour wage increase the next day and that Robert J. Davis would act as spokesman for the employees.

The next morning (September 21, 1961) the employees assembled at the Melbourne plant and awaited the arrival of company officials. Doyle Tawney, the plant superintendent, was the first official to arrive and upon his arrival he inquired as to what was going on. In response to Tawney's request for someone to speak for the group, Robert J. Davis presented a demand for pay increases of 15 cents per hour. After explaining that business at the time would not justify such an increase and indicating that other changes might be necessary to give one, Taw-

ney left the group. Shortly thereafter, Carl Moritz, manager of the Melbourne plant, arrived and, upon being advised of the situation by Tawney, requested that the men be assembled in the warehouse a short distance away. A meeting in the warehouse took place immediately thereafter.

At the meeting in the warehouse (on September 21, 1961) Davis again acted as spokesman for the employees and again sought a 15-cent per hour increase. There is conflicting evidence as to whether at this time Joseph H. [fol. 36] Harmon signalled himself out as being aligned with Davis.[2] On the basis of observations of witnesses and analysis of the entire record I believe and find that Harmon did conspicuously align himself with Davis. Davis and Moritz discussed this wage increase demand but the meeting ended without the parties coming to an agreement. At the conclusion of the meeting Moritz asked the employees to return to work but the employees did not do so. Instead they assembled in an area in front of the warehouse and continued to discuss the matter. While the employees weer talking among themselves in the area in front of the warehouse, Davis and McKnight left Respondent's premises and attempted to contact a union representative. The attempt was not successful and Davis and McKnight then returned to Respondent's premises. Moritz was addressing the employees who were still assembled in the area in front of the warehouse. In Davis' absence several employees, including Harmon, asked questions concerning wage increases. When Davis and McKnight arrived, Davis again took the leading part in trying to get wage increases. Shortly thereafter the men

---

[2] Davis, Harmon and McKnight testified that he did. Moritz first testified he could not recall whether Harmon stepped out of the group to join Davis. Later he testified that Harmon did not "take a step" to join Davis. Sherman Franks testified that Davis was the spokesman for the employee group and

> Q. Was anyone else standing up with him when they talked with Mr. Moritz in the warehouse?
>
> A. All of us were standing there.

Franks was not asked specifically whether Harmon was conspicuous at this meeting.

returned to work after being assured by Moritz that wage increases would be forthcoming within 30 days. That evening Moritz asked McKnight "Johnny would you have gone through with what you started this morning?" McKnight responded by asking Moritz if he (Moritz) meant the walkout and Moritz said "yes." McKnight [fol. 37] then told Moritz, "yes, my father told me once I made my play to follow it through and I had made my play."[2]

The men returned to work about 10 o'clock. By noon that day Moritz had telephoned Respondent's office in West Palm Beach and reported to Respondent's President Russell J. Burnup, the events outlined above. Russell Burnup told Moritz he (Burnup) would consider the matter and advise him (Moritz) what he "should do about the situation." By letter dated September 22, 1961, Russell Burnup advised Moritz:

> Dear Carl:
>
> Certainly was suprised and somewhat concerned by the report of the incident this a.m., that your drivers had staged a mass walk-out.
>
> It is our understanding that they have requested a general increase of .15c per hour for all drivers. We feel this demand is exorbitant, but if necessary, we believe it advisable that you use your own discretion in regard to the matter.
>
> May we also call your attention to the fact that under such circumstances your operation will not be subject to making the necessary profit, and as a result it will probably be necessary that you give consideration to cutting down manpower.
>
> [fol. 38] Please make it clearly understood among the employees that a wage increase merits an improvement in cooperation on their part. Actually, we do

[2] Moritz did not recall McKnight making reference to his father but did testify that McKnight gave an affirmative answer to his (Moritz') question.

not feel that you should authorize a general overall .15c per hour wage increase, as all employees do not have the same qualifications and capabilities. However, as you are on the ground floor, and are fully familiar with all the phases of this matter, we will leave it to your discretion.

Very truly yours,

On September 22, 1961, Davis contacted the president and the vice president of the Union involved herein (Local Union No. 172) and was told to find out whether a substantial number of employees were interested in Local 172.

On Monday, September 25, 1961, Moritz informed Tawney that he (Moritz) was going to grant pay increases (they were made effective October 1, 1961), and that he "would have to figure a way to cut back"[4] and asked Tawney for a list of employees to be considered for layoff.

On Monday and Tuesday (September 25 and 26, 1961), Moritz and Tawney considered for layoff seven of Respondent's relatively new employees. (Wills, a block truckdriver; Yeager, a ready-mix driver; Richardson, a warehouseman; Hensley, a block truckdriver, Davis, a [fol. 39] ready-mix driver; Harmon, a ready-mix driver; and McKnight, a sand truckdriver).[5] They attempted to find a basis of comparison among a number of junior employees to determine which to lay off.

In considering Wills, Moritz initially favored letting him go while Tawney recommended keeping him. It was decided to keep him in spite of his junior status because he "could really deliver concrete block, was back and forth in a hurry and did a darn good job delivering them."

Yeager was removed from consideration in spite of Tawney's feeling that he should go because Moritz felt

---

[4] As noted above the letter authorizing pay increases also instructed Moritz to give consideration to cutting down of manpower. In addition, Respondent at this time was "at the point of operating with excess personnel due to a slowup in business."

[5] Other relatively new employees, employed as laborers were not considered.

"sorry for the guy"—he was known by Moritz to be in serious financial trouble and to be ill with a work-connected infection and to owe Respondent money.

Moritz initially favored letting Richardson go but deferred to Tawney's view on him. Richardson was recognized as part of a productive team in the warehouse, a department where no decline in business was anticipated, and Tawney did not want to meddle with it (break up the team) while they continued to produce.

It was decided to keep Hensley in view of the department in which he worked and his good work. Hensley drove one of two block trucks in the warehouse. Wills drove the other.

When considering Davis, it was noted by both Moritz [fol. 40] and Tawney that he was prone to take advantage of opportunities to loaf.

Harmon, an employee who had already been transferred from the block department because of his inability to do the work there, was noted as having slowed down after having worked in the ready-mix department, one of the departments determined to be overstaffed.

In discussing McKnight it was brought out that he (McKnight), was frequently observed "standing around the coke room." An additional consideration in McKnight's case was that the sand department in which McKnight was working "was not a profitable thing, it was more an accommodation to the customers than anything else," and that turning sand orders over to a sand company would eliminate expenses involved in handling sand. In fact, this "particular chore" was turned "over to a sand company."

In their consideration of the above-named individuals for layoff Moritz and Tawney did not discuss the employees' concerted or union activity or the walkout.

Late on Wednesday, September 27, 1961, Moritz decided to lay off Davis, Harmon and McKnight. However, the layoffs were not actually made until September 29, because Moritz did not get an opportunity to have their final paychecks made up prior to that date.

The first meeting between union officials and a group of Respondent's employees took place during the evening of

September 28, 1961, at the union hall in Eau Gallie, Florida. Approximately 15 of Respondent's employees, [fol. 41] including Davis and McKnight, attended this meeting. At the meeting the Union for the first time obtained signatures to union authorization cards.

The first layoffs took place at the close of the workday on Friday, September 29, 1961. At that time, Moritz summoned Davis and McKnight to his warehouse office. Tawney, their immediate supervisor, was at this meeting, as was Yvonne Burney, Respondent's bookkeeper, who works in the warehouse office. After Davis' and McKnight's arrival, Moritz advised them that because of the cost of the pay raise and a drop in business he was laying them off. He further stated that if business picked up, they would be considered for reemployment. At this time, Moritz gave both employees an extra check to carry them for several days.[6]

Superintendent Tawney testified that around the middle of October 1961, Lyle Pate, one of Respondent's mechanics, told him (Tawney) that on the preceding night Davis and Harmon had come to his (Pate's house to try to get him to join the Union and that during the course of the conversation he (Pate) was told "that if they didn't get their jobs back, if the Union didn't get in, it would be fixed so no one could work" by dynamiting Respondent's sand silos. Tawney immediately reported this conversation [fol. 42] (the conversation between Tawney and Pate) to Moritz. After commenting, "well, now we have really got trouble," Moritz contacted Respondent's counsel. On October 25, 1961, following the arrival of Respondent's counsel at the plant, Pate was interrogated about this matter and gave Respondent a notarized document stating *inter alia:*

---

[6] The testimony of the various witnesses concerning this meeting varies with respect to details but is in accord concerning substance except that Davis and McKnight deny that they were told that one of the reasons for the layoff was a drop in business and deny that they were told that they would be considered for reemployment if things picked up. In the light of the entire record here and on the basis of observations of witnesses I do not credit their denials. I find the facts to be as set forth above.

> Towards the end of the talk [on about October 13, 1961], Davis said: "If the Union doesn't get in, we're going to use some dynamite to make sure that those who didn't vote for it won't work either; we'll blow the gravel bin over and make sure that no one works." Harmon was right there at that time, but didn't add anything to Davis' statement.

It is noted that Tawney testified that Pate (at the conference where his notarized statement was drawn) attributed the remarks about dynamiting to Harmon whereas the written statement attributes these remarks to Davis. Pate was not called as a witness in this proceeding.

By letter dated November 8, 1961, Respondent advised Davis and Harmon

> When you were laid-off on September 29, 1961, it was with the understanding that business in your particular job was slow and that you would have "first call" on any job that came available once business picked up.
>
> Business is now picking up, but I regret to advise you that I can not re-employ you.
>
> [fol. 43] It has come to my attention that you made or condoned serious threats to damage property of the Company should the Union fail to win its election. Under such circumstances, I can not re-employ you with our company.
>
> Very truly yours,

Neither Davis nor Harmon made any attempt to contact Respondent concerning the allegations contained in the letter quoted above. At the hearing, herein, Harmon testified that on October 11, 1961, he called upon Pate at his (Pate's) house and obtained his (Pate's) signature upon a union card. He testified further that this was the only time he called upon Pate at his home and that at this time he (Harmon) was alone. Harmon denied that he ever threatened to damage company property or that he was ever in the presence of anyone who did. Davis denied that

he had ever been to Pate's house, denied that he threatened "to dynamite some sand silos" and denied that Harmon made such a threat in his presence. As noted above, Pate did not testify herein.

Davis testified that on or about November 17, 1961, he met Walter Burnup, son of Respondent's president who was in training at the Melbourne plant for a management position and whose interests are more identifiable with Respondent than with Respondent's employees, in a bar and they discussed the pros and cons of unionism. After considerable prompting by the General Counsel, Davis testified that Burnup indicated he (Davis) had been laid off for leading the walkout. Burnup testified that he recalled the conversation, that he and Davis argued the [fol. 44] relative merits of unionism and that during the discussion Davis indicated he (Davis) thought he had been laid off for leading the walkout and he (Burnup) told Davis he (Burnup) "didn't think they would let him go for that reason," although he (Burnup) thought Davis was wrong in leading the walkout. On the basis of observations of witnesses and analysis of the record herein, I believe Burnup's version of this conversation more reliable than that given by Davis and credit Burnup's version.

Upon his return from a delivery at the close of business on September 29, 1961, Harmon was laid off by Moritz. Moritz told Harmon that a cutback was necessitated by the cost of the raise and slow business, and that he was being laid off. There is sharp conflict as to whether Harmon was told he would be considered for reemployment if business picked up. Harmon testified he inquired about this matter and was told he would not be considered. Moritz and Tawney, who was present during the conversation, testified that Harmon was assured that he would be one of the first to be considered. In the light of the entire record and on the basis of observations of witnesses, I credit the testimony of Moritz and Tawney concerning this matter. Harmon also was given an extra check to carry him for several days.

Tawney testified, without contradiction, that approximately 1 month after the layoffs of September 29 busi-

ness started to pick up and that he reported this matter to Moritz and asked for more help. Moritz stated "Well, let's get McKnight." Tawney thereupon contacted McKnight and made arrangements for him to return to work for Respondent. Upon his return (on or about November [fol. 45] 6, 1961), McKnight was assigned to drive the sand truck as he had done prior to his layoff. At the same time he was given a wage increase. The day after his return to work, Tawney asked McKnight how he and "Jimmy Hoffa" were getting along and said "I hear you was talking up Union yesterday on your first day back." McKnight told Tawney he was not talking about the Union on company time and Tawney replied "Well, I heard you was and I also heard that you thought you were getting [a bad deal] around here." McKnight admitted that he anticipated a "bad deal" but that such had not occurred and Tawney then said "If you do, if anybody tries to pull anything on you, you let me know about it and I'll try to straighten the matter out." McKnight later acknowledged that "no one picked on" him until he broke the axle leading to his discharge on November 29, 1961.

On either his first or second day back at work, McKnight broke an axle on the truck he was driving. No action was taken against him, however, as Dick Burney, the garage foreman, advised Tawney that the broken axle was probably not McKnight's fault and that it was probably an unavoidable accident.

On November 29, 1961, McKnight again broke an axle on the truck he was driving. On this occasion the mechanic, Gregory Lehman, who had gone to the site of the damaged truck, observed the truck was "bogged down" and buried to the axle housing and that the tracks in the sand indicated that the truck had been rocked back and forth in an effort to free it — a direct violation of Respondent's instructions to its truckdrivers. Lehman conveyed this information to Garage Foreman Burney who [fol. 46] in turn conveyed it to Superintendent Tawney who in turn related it to Moritz. That evening McKnight was summoned to Moritz' office and discharged. He was told he was being discharged for abuse of equipment. According to McKnight, at the time of his discharge he

claimed the breaking of the axle was not his fault. Moritz and Tawney testified McKnight did not offer any explanation for the broken axle. Otherwise the various versions of the discharge conversation are substantially the same. A resolution of this conflict does not appear necessary, and is not made herein because under all versions McKnight was told he was being discharged for abuse of equipment.

Conclusions

The General Counsel contends that the terminations of employment of Davis, Harmon and McKnight on September 29, 1961, were discriminatory discharges, that the entire record herein reveals that they were not temporary layoffs — as contended by Respondent — and that the congeries of the evidence reveals that these terminations were not for the reasons asserted by Respondent — on account of economic conditions — but because of the concerted or union activities of Davis, Harmon and McKnight.

Apparently, it is the General Counsel's theory that a substantial number of Respondent's employees engaged in a walkout and attempted to organize a union and that the leaders of this movement were discharged because of this activity.

There is no doubt herein that the walkout did, in fact, take place and that Respondent had knowledge of it. Also, [fol. 47] the facts found above reveal that Davis, Harmon and McKnight were "leaders" during this movement and that Respondent was aware of this fact. Respondent concedes that it was aware of Davis' leadership but denies knowledge of the leadership by Harmon and McKnight. The facts found above belie this position. With regard to union activities as opposed to the concerted activity of the walkout, there is no evidence that Respondent was aware of any such activity prior to September 29, 1961. The record does reveal that through a report by employee Pate, Respondent was aware of union activity by Davis and Harmon during October 1961. The record further reveals that after McKnight's return to work Respondent

was aware of his union activity but the same evidence reveals that Respondent was not disturbed about his union activity so long as it was not on company time, and that Respondent was anxious that McKnight not suffer any retaliation because of his participation in the walkout or in union activities.

The only evidence indicating that Respondent bore any animosity towards Davis, Harmon and McKnight, is the fact that the services of these individuals were terminated while persons with less seniority were retained and the fact that only the services of these three were terminated. I believe, find and conclude that this is not enough to warrant rejection of Respondent's contention that the terminations on September 29, 1961, were temporary layoffs made on account of economic reasons and that the persons selected for layoff were picked because they had exhibited a tendency to be noncooperative and Respondent [fol. 48] could more readily do without their services than without the services of those retained.[7]

The lack of discriminatory motivation in making the layoffs is further substantiated by Respondent's subsequent recall of McKnight on or about November 6, 1961. *See Mississippi Products Inc.*, 103 NLRB 1388, 1405. The General Counsel contends, however, that McKnight was reinstated in bad faith. The facts found above belie this contention. Not only was McKnight given the exact same job which he had had before the layoff and given the raise which had been instituted in his absence, but Tawney advised him that in the event of any trouble, he would "try to straighten the matter out." Had Respondent been out to "get" McKnight, as the General Counsel contends, by seizing upon the first mistake which he made, Respondent would not have had to wait the month out. McKnight gave Respondent an opportunity on his first or second day back when he broke an axle. Respondent gave him the benefit of the doubt and took no action. The General Counsel

---

[7] The evidence adduced is not sufficient to warrant a finding that in considering specific individuals for layoff Respondent deliberately attempted to find reasons to terminate Davis, Harmon and McKnight.

contends further that McKnight's subsequent discharge was discriminatorily motivated but here again the facts found belie this contention. The record reveals that contrary to instructions McKnight "bulldozed" his truck rather than call for help and in doing so broke an axle and that he was discharged for this abuse of equipment.

As noted above, Respondent, relying upon a report from employee Pate that Davis and Harmon had engaged in [fol. 49] post-layoff conduct of a disloyal nature — a report that Davis and/or Harmon had threatened to damage company property—, informed Davis and Harmon that because of such conduct they thereby forfeited their right to reinstatement. The General Counsel relying upon the doctrine of *Rubin Bros. Footwear, Inc.*, 99 NLRB 610 and the evidence that such misconduct did not in fact occur, contends that Respondent seized upon Pate's report to get rid of Davis and Harmon and that this is a pretext situation indicating that the September 29, 1961, terminations were not for the reasons assigned by the Respondent. There is no contention herein that, assuming that the September 29, 1961, layoffs were not unlawful, the letter to Davis and Harmon dated November 8, 1961 (quoted above), converted the layoffs to unlawful discharges as of November 8, 1961.

Leaving aside for the moment the question of whether Davis and Harmon actually made the statements or engaged in the conduct attributed to them, the record reveals that Respondent had an honest belief that they had engaged in misconduct. Assuming that Davis and Harmon did not in fact engage in misconduct, the evidence adducted is nevertheless insufficient to establish by inference or otherwise, that Respondent was out to get them because of their concerted or union activities. Of course, Pate's report to Respondent revealed, in addition to the alleged misconduct, that at the time Davis and Harmon were engaging in activity protected by the Act — were seeking Pate's signature to a union card — but there is no evidence that Respondent resented this activity. As previously noted, the only indication that Respondent bore any animosity toward the individuals involved herein

[fol. 50] is the fact that they and only they were terminated. Also, as previously noted, when McKnight was reinstated Respondent indicated a lack of resentment against union activity so long as it was carried on properly. Under these circumstances, it is believed that the *Rubin Bros.* doctrine is not applicable. Accordingly I reject the General Counsel's contention.

Conclusions of Law

1. Burnup and Sims, Inc., is engaged in, and during all times material was engaged in, commerce or in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union No. 172, Airline Supply Technicians, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not discriminate against Robert J. Davis, Joseph H. Harmon and John P. McKnight in violation of Section 8(a) (1) and (3) of the Act, as alleged in the complaint herein.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, I recommend that the complaint in this matter be dismissed in its entirety.

[fol. 51]

Dated at Washington, D. C.
February 13, 1962

(Signed) By: Albert P. Wheatley
ALBERT P. WHEATLEY
Trial Examiner

BEFORE THE NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S EXCEPTION TO INTERMEDIATE REPORT

* * * *

Now comes the Respondent, BURNUP & SIMS OF MELBORNE, INC., by its counsel, Fisher & Phillips, and files this single exception to the Intermediate Report herein; and in support of the Intermediate Report, files the accompanying brief:

> Respondent excepts to the Trial Examiner's failure to consider and make a finding upon the Board's failure to consider Respondent's appeal of Regional Director's refusal to grant a continuance.

FISHER & PHILLIPS

(Signed) By: William F. Ford
Counsel for Respondent

26 Pryor Street, N. E.
Atlanta 3, Georgia

WFF:eb

[fol. 52] CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 6th day of March, 1962, caused a copy of the foregoing Respondent's Exception to Intermediate Report to be furnished to the following individuals by depositing same in the U. S. Mail, postage prepaid:

Frank Hamilton, Jr., Esquire
Hardee & Ott
308 Tampa Street
Tampa, Florida

Frank Kruzich, Esquire
Counsel for the General Counsel
National Labor Relations Board
112 East Cass Street
Tampa, Florida

Mr. Robert Davis
819 King Richard Road
Eau Gallie, Florida

(Signed) By: William F. Ford
of Counsel

WFF:eb

[fol. 53] BEFORE THE NATIONAL LABOR RELATIONS BOARD

* * * *

EXCEPTIONS OF THE GENERAL COUNSEL TO THE INTERMEDIATE REPORT AND RECOMMENDATION OF THE TRIAL EXAMINER AND BRIEF IN SUPPORT OF EXCEPTIONS

Counsel for the General Counsel of the National Labor Relations Board, pursuant to Section 102.46 of the Rules and Regulations of the Board, Series 8, as amended, excepts to the following findings of fact, conclusions of law, and recommendations of the Trial Examiner as set forth in his Intermediate Report, dated February 16, 1962.

Exception 1:

To the Trial Examiner's according credence to the testimony of Carl Moritz and Doyle Tawney.

Exception 2:

"By noon that day Moritz had telephoned Respondent's office in West Palm Beach and reported to Respondent's President Russell J. Burnup, the events outlined above. Russell Burnup told Moritz he (Burnup) would consider the matter and advise him (Moritz) what he 'should do about the situation.'" (IR 37, lines 5-11)

Exception 3:

To the Trial Examiner's according any probative worth to the letter dated September 22, 1961, from Respondent's President Russell Burnup to Carl Moritz, and to giving any consideration to said letter in his Intermediate Report (IR 37, lines 11-30; IR 38, lines 1-11, 31-32, fn. 4).

[fol. 54]

Exception 4:

"On Monday, September 25, 1961, Moritz informed Tawney that he (Moritz) was going to grant pay increases . . . and that he 'would have to figure a way to cut back' and asked Tawney for a list of employees to be considered for layoff." (IR 38, lines 19-22)

Exception 5:

"In addition, Respondent at this time was "at the point of operating with excess personnel due to a slow-up in business.'" (IR 38, lines 33-34, fn. 4)

Exception 6:

To the finding that on September 25, and 26, 1961, Moritz and Tawney considered for layoff seven of Respondent's relatively new employees. (IR 38, lines 25-29; IR 39, lines 1-4).

Exception 7:

To the finding that other employees besides Davis, Harmon and McKnight were not let go for various and sundry reasons (IR 39, lines 6-28).

Exception 8:

"When considering Davis, it was noted by both Moritz and Tawney that he was prone to take advantage of opportunities to loaf." (IR 39, line 30; IR 40, lines 1-2).

Exception 9:

"Harmon, an employee who had already been transferred from the block department, because of his inability to do work there, was noted as having slowed down after having worked in the ready-mix department, one of the [fol. 55] departments determined to be overstaffed." (IR 40, lines 4-8)

Exception 10:

"In discussing McKnight it was brought out that he (McKnight) was frequently observed 'standing around the coke room.'" (IR 40, lines 10-12)

Exception 11:

"An additional consideration in McKnight's case was that the sand department in which McKnight was working 'was not a profitable thing, it was more an accommodation to the customers than anything else,' and that turning sand orders over to a sand company would eliminate expenses involved in handling sand." (IR 40, lines 12-17)

Exception 12:

"In their consideration of the above-named individuals for layoff, Moritz and Tawney did not discuss the employees' concerted or union activity or the walkout." (IR 40, lines 20-22)

Exception 13:

"Late on Wednesday, September 27, 1961, Moritz decided to lay off Davis, Harmon and McKnight. However, the layoffs were not actually made until September 29, because Moritz didn't get an opportunity to have their final pay checks made prior to that date." (IR 40, lines 24-28)

Exception 14:

"After Davis' and McKnight's arrival, Moritz advised them that because of the cost of the pay raise and a drop [fol. 56] in business, he was laying them off. He further stated that if business picked up, they would be considered for reemployment." (IR 41, lines 10-14)

Exception 15:

"The testimony of the various witnesses concerning this meeting varies with respect to details but is in accord concerning substance except that Davis and McKnight deny that they were told that one of the reasons for the layoff was a drop in business and deny that they were told that they would be considered for reemployment if things picked up. In the light of the entire record here and on the basis of observations of witnesses I do not credit their denials. I find the facts to be as set forth above." (IR 41, lines 28-36, fn. 6)

Exception 16:

"Neither Davis nor Harmon made any attempt to contact Respondent concerning the allegations contained in a letter quoted above." (IR 43, lines 9-11)

Exception 17:

"After considerable prompting by the General Counsel, Davis testified that Burnup indicated that he (Davis) had

been laid off for leading the walkout." (IR 43, lines 29-32)

Exception 18:

"On the basis of observations of witnesses and analysis of the record herein, I believe Burnup's version of this conversation more reliable than that given by Davis and credit Burnup's version." (IR 44, lines 6-9)

[fol. 57]

Exception 19:

"There is sharp conflict as to whether Harmon was told he would be considered for reemployment if business picked up. Harmon testified he inquired about this matter and was told he would be considered. . . . In the light of the entire record and on the basis of observations of witnesses, I credit the testimony of Moritz and Tawney concerning this matter." (IR 44, lines 15-25)

Exception 20:

"Approximately one month after the layoffs of September 29, business started to pick up . . ." (IR 44, lines 27-29)

Exception 21:

"The General Counsel contends that the terminations of employment of Davis, Harmon and McKnight on September 29, 1961, were discriminatory discharges . . ." (IR 46 lines 16-18)

Exception 22:

"The record further reveals that after McKnight's return to work, Respondent was aware of his union activity but the same evidence reveals that Respondent was not disturbed about his union activity so long as it was not on company time and that Respondent was anxious that McKnight not suffer any retaliation because of his participation in the walkout or in union activities." (IR 47, lines 12-19)

[fol. 58]

Exception 23:

"The only evidence indication that Respondent bore any animosity towards Davis, Harmon and McKnight is the fact that the services of these individuals were terminated while persons with less seniority were retained and the fact that only the services of these three were terminated. I believe, find and conclude that this is not enough to warrant rejection of Respondent's contention that the terminations on September 29, 1961, were temporary layoffs made on account of economic reasons and that the persons selected for layoff were picked because they had exhibited a tendency to be noncooperative and Respondent could more readily do without their services than without the services of those retained." (IR 47, lines 21-31; IR 48, lines 1-2).

Exception 24:

"The lack of discriminatory motivation in making the layoffs is further substantiated by Respondent's subsequent recall of McKnight on or about November 6, 1961." (IR 48, lines 4-6)

Exception 25:

"Not only was McKnight given the exact same job which he had before the layoff and given the raise which had been instituted in his absence . . ." (IR 48, lines 10-12)

Exception 26:

"McKnight gave Respondent an opportunity on his first or second day back when he broke an axle. Respondent gave him the benefits of the doubt and took no action." (IR 48, lines 17-20)

[fol. 59]

Exception 27:

"The General Counsel contends further that McKnight's subsequent discharge was discriminatorily motivated but

here again the facts found belie this contention." (IR 48, lines 20-23)

Exception 28:

"As noted above, Respondent relying upon a report from employee Pate that Davis and Harmon had engaged in post-layoff conduct of a disloyal nature—a report that Davis and Harmon had threatened to damage company property . . . ." (IR 48, lines 28-29; IR 49, lines 1-3)

Exception 29:

"There is no contention herein that assuming that the September 29, 1961, layoffs were not unlawful the letter to Davis and Harmon dated November 8, 1961 . . . converted the layoffs to unlawful discharges as of November 8, 1961." (IR 49, lines 11-16)

Exception 30:

"The record reveals that Respondent had an honest belief that they had engaged in misconduct." (IR 49, lines 20-22)

Exception 31:

"Assuming that Davis and Harmon did not in fact engage in misconduct, the evidence adduced is nevertheless insufficient to establish, by inference or otherwise, that Respondent was out to get them because of their concerted or union activities." (IR 49, lines 22-26)

[fol. 60]

Exception 32:

". . . that at the time Davis and Harmon were engaging in activity protected by the Act—were seeking Pate's signature to a union card—but there is no evidence that Respondent resented this activity." (IR 49, lines 27-30)

Exception 33:

"Also as previously noted when McKnight was reinstated Respondent indicated a lack of resentment against union activity so long as it was carried on properly. Un-

der these circumstances, it is believed that the *Rubin Brothers* doctrine is not applicable. Accordingly, I reject the General Counsel's contention." (IR 49, line 30 to IR 50, line 6)

Exception 34:

"Respondent did not discriminate against Robert J. Davis, Joseph H, Harmon and John P. McKnight in violation of Section 8(a)(1) and (3) of the Act, as alleged in the complaint herein." (IR 50, lines 21-24)

Exception 35:

To the Trial Examiner's recommended order as follows: "Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, I recommend that the complaint in this matter be dismissed in its entirety." (IR 50, lines 28-31)

Additionally, Counsel for the General Counsel excepts to failure of the Trial Examiner to find:

1. The layoffs of September 29, 1961, were not economically motivated but were effectuated in retaliation for the walkout of the prior week and/or even if the [fol.61] layoff was economically motivated, the selection of the individuals for layoff was discriminatory and in violation of the Act.

2. That Robert J. Davis and Joseph P. Harmon did not engage in any misconduct and that the doctrine of *Rubin Bros. Footwear, Inc.*, 99 NLRB 610 is applicable herein and Respondent's failure to recall these individuals was further discrimination.

3. The rehire of John P. McKnight was not in good faith and the subsequent discharge of McKnight on or about November 29, 1961, was not for cause but was a mere pretext and part of the overall plan to rid the plant of Davis, Harmon and McKnight, the leaders of the September 29 walkout.

4. Respondent did discriminate against Robert J. Davis, Joseph P. Harmon and John P. McKnight in violation of Section 8(a)(1) and (3) of the Act.

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

D-3106
137 NLRB No. 90 West Palm Beach, Fla.

DECISION AND ORDER—June 25, 1962

* * * *

On February 13, 1962, Trial Examiner Albert P. Wheatley issued his Intermediate Report in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the com-[fol. 62] plaint, and recommending that the said complaint be dismissed, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel and the Respondent filed exceptions to the Intermediate Report and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has conslidered the Intermediate Report, the exceptions and briefs, and the entire record in this case, and finds merit in the General Counsel's exceptions to the Intermediate Report for the reasons discussed below. Accordingly, the Board adopts only those findings, conclusions and recommendations of the Trial Examiner which are consistent with the decision herein.

1. The record establishes, as found by the Trial Examiner, that on September 21, 1961, approximately 19 truckdrivers staged a walkout and concerted refusal to resume work and through their spokesman, Robert J. Davis, presented a demand for a pay increase of 15 cents an hour; that Respondent was fully cognizant of the facts that the employees were engaging in a protected concerted activity and that the leaders during this movement were Davis, Joseph H. Harmon and John P. McKnight; that the men returned to work after manager Carl Moritz assured them wage increases would be forthcoming with-

[fol. 63] in 30 days; that on September 25, Moritz decided to grant pay increases and to institute a cutback in personnel; that wage increases were made effective October 1, 1961; and that Davis, Harmon and McKnight were terminated at the end of their workday on Friday, September 29, 1961.

The Trial Examiner accepted Respondent's contention that these terminations were temporary layoffs made for economic reasons and found the fortuitous selection for layoff of the three leaders in the concerted activity insufficient to warrant rejection of Respondent's defense that they were chosen because they exhibited a tendency to be uncooperative and their services were therefore of less value to it than were those of employees retained. In reaching his conclusion, the Trial Examiner was persuaded by what he regarded as a lack of evidence bearing upon Respondent's unlawful motive. The General Counsel has excepted to these findings, contending that the record evidence demonstrates that the layoffs were not economically motivated but rather were effectuated in retaliation for the walkout of the prior week, and, even if there were economic reasons for the layoffs, the selection of the three leaders of the walkout for layoff was discriminatory and in violation of the Act. We find merit in the General Counsel's contentions.

With respect to Respondent's asserted economic reasons for the layoffs of September 29, 1961, at no time did Moritz testify that his decision to cut back manpower was influenced or necessitated by an anticipated or exper-[fol. 64] ienced drop in business.[1] Although Tawney, Moritz' assistant, testified that at this time they were at the point of operating with excess personnel due to a slowup in business, he did not relate this factor to the decision to institute the layoff, a decision in which he took no part, but rather to the selection of the employees to be laid off. Indeed, other testimony by Respondent's

[1] The only reference made by Moritz to such economic considerations was advanced as a factor in selecting the employees to be laid off. In this respect he indicated without specification that his selection was influenced by the anticipated business in the several departments.

witnesses indicates that there was no substantial change in business activity and that the layoffs in fact caused some dislocation and operating difficulties. Thus, Tawney testified that right up through the time of the layoffs his drivers, including those in the ready-mix and the sand departments affected by the layoffs, were working an average of 55 hours a week on a five-day week basis. Moritz testified that the drivers were working 11 to 15 hours a week overtime right through the layoff; that during the layoff other drivers were used on the ready-mix trucks; and that they had to take as drivers employees from other departments, including some mechanics, to keep the ready-mix trucks moving with scheduled orders. In this connection, it is noted that Respondent attempted to establish by testimony that the sand department was an unprofitable operation which was merely an accommodation to customers and that it was eliminated by turning those orders over to a "sand company," thus saving the expenses involved. However, the same witnesses gave contradictory testimony indicating that the sand department was not in fact eliminated, that one of the laborers with less seniority than those employees who were laid off was used to drive the sand truck after the [fol. 65] layoff, and that orders were piling up to such an extent that McKnight was recalled about a month later to his old job driving the sand truck. From such evidence, we can only conclude that Respondent did not base its decision to institute a layoff upon any economic necessity related to any anticipated or experienced drop in business.

The sole economic consideration claimed by Moritz as the reason for his determination to institute the layoff was the wage increase, which employees had demanded by their concerted activities, and which Moritz concurrently decided to grant, in part.

In support of this defense, Respondent offered in evidence the letter of September 22, 1961, from Respondent's president to manager Moritz, set forth in the Intermediate Report. Moritz, who alone made the simultaneous decisions to grant wage increases and to institute the layoff,

claims to have made his decision based upon this letter.[2] While there are some ambiguities in the letter,[3] it is clear [fol. 66] that when the various phrases used are read in their context, the letter expressed the objective of maintaining the required profit ratio at the operation involved and cautioned as to possible steps to be considered in order to maintain that ratio in the event the maximum raise demanded by the employees was granted. It is obvious that Moritz had no clear directive to cut back on personnel, nor did he have to grant the 15 cents maximum authorized. Moreover, the letter does not establish as an economic fact that the granting of the full 15 cents demanded or any part thereof would necessarily result in an unfavorable profit ratio for the operation.

Furthermore, Moritz testified that he had previously requested and received authority to grant a general overall 5 cents per hour increase and had held the authorization for this wage increase "in his pocket," making no disclosure thereof, since September 14, 1961, well before the walkout. He did not indicate that there was any economic reason for his withholding of this authorized increase of

---

[2] The letter itself vests final decision on these matters in Moritz. On the Monday following its receipt, Moritz advised his assistant, Tawney, of his decision to grant raises and to cut back on manpower. Tawney testified that he was not consulted on whether to grant the wage increases and was not advised of the amount of increase Moritz had decided to give. Nor was he consulted as to whether or not a layoff was necessary and, if so, how many employees would have to go. He was merely instructed to make a list of six possibilities for the anticipated layoff.

[3] While this letter left the determination as to whether circumstances made it necessary to meet the full demand of the employees to Moritz' "discretion in regard to the matter," it went on to point out that "under such circumstances (i.e., "a general increase of 15 cents per hour for all drivers"), your operation will not be subject to making the necessary profit, and as a result, it will probably be necessary that you give consideration to cutting down manpower." Whether "manpower" refers to man-hours worked or number of employees on the payroll and whether "not be subject to" conveys the meaning of an exemption or failure to meet a requirement, are ambiguities in the letter, the resolution of which are irrelevant to the issue of whether a clear economic necessity for a layoff was stated thereby.

pay; that there was none is suggested by the fact that it was not authorized pursuant to any particular employee demand, but was the result of a management appraisal after Moritz's representation to Respondent's officers that his crew was cooperating and merited the raise. However, the fact that Moritz had this authorization "in his pocket" at the time of the employees' demand and when he received his president's letter relating to those demands has a specific bearing upon the economic facts before him [fol. 67] when he decided upon the layoff. For, even had he granted the full 15 cents demanded, 10 cents thereof would be all that could have been considered as having a new economic impact under the authorization letter.

But Moritz did not grant the requested 15 cents per hour to all truckdrivers. He testified that he decided to and did grant a general increase ranging between 5 cents and 15 cents to all employees at the operation, approximating 50 in number, and that of the 19 truckdrivers, 9 received 15 cents; 4 received 10 cents, and 6 received 5 cents. Thus, much of the actual increase granted was chargeable directly to the previously authorized raises, and only a small part could be properly included in any calculation of the effect of any raises upon the profit ratio.

Although Respondent purports to rely upon the lower profits for the operation, resulting from the raises, it has presented no figures whatsoever relating the cost of the raises to the profit ratio required or establishing the alleged economic necessity to cut costs, and no attempt was made to show why a layoff was considered as preferable to other economic measures.[4] This lends weight to the con-

[4] It is interesting and perhaps enlightening to note that such other methods were not foreign to Respondent. Thus, on the morning of September 20, when the assembled employees first presented their demand for a 15 cents per hour wage increase to Tawney, his response was to point out to the employees that economically he could grant them their request and cut them back to 40 hours a week by hiring 10 additional employees and eliminating their overtime. He thus pointed out to the employees the economies for the employer which would result with the same man-hours worked but with overtime eliminated. At that time the employees indicated their willingness to accept this solution but expressed a doubt as to whether the elimination of overtime could be maintained.

Interestingly, a simple mathematical calculation discloses the

[fol. 68] clusion that Respondent had no such concrete economic considerations upon which it based its determination to layoff precisely three employees — the very ones, who by stepping forward, or by other prominent action, identified themselves before both Respondent and other employees as the leaders in the concerted activity.

It is therefore clear from the testimony of Respondent's own witnesses that the only consideration involved in instituting the layoff was the *fact* rather than the effect of the wage increases resulting from the employees' concerted demands. This was dramatized by Respondent's timing of the layoff on the eve of the effective date of the raise. Further Respondent's resentment and disapproval of employees' concerted activity is clearly demonstrated by Moritz' conduct in calling the drivers, who received the October 1, raises, individually into his office in the presence of the president of Respondent. One of these drivers testified without contradiction that Moritz took this occasion to advise him that the employees went about getting the raise in the wrong manner and that he, Moritz, would not stand before the group of men in that manner again. The Trial Examiner made no mention of and apparently ignored this evidence bearing upon Respondent's motive. Thus, all events immediately preceding and following the layoff, including the continued overtime, belie a defense of economic necessity. On the contrary, we are persuaded that the handling of the layoff by the Re-
[fol. 69] spondent, looked at in totality, shows that its motive was to emphasize to its employees the danger of collective action and to discourage them from engaging in such protected concerted activity in the future.

Moreover, even assuming *arguendo* that economic objective is a proper label for Respondent's conduct, and that without assertion of a necessity therefor, Respondent

---

economies to which Tawney alluded. For, presuming a curtailment of business commensurate with the man-hourr worked by three men, Respondent could have granted the full 15 cents per hour raise to all drives, cut their overtime in half and would have thereby received more man-hours worked on a smaller total payroll than would be the case by maintaining the same overtime and laying off three men, as it did.

could claim as a defense an affirmative desire to maintain a specific profit ratio from the operation and to bear none of the cost of its employees' economic demands, it is apparent from the foregoing that Respondent did not approach the matter with a view to accomplishing the best possible financial results. Rather, Respondent sought to place the burden of the added expense directly upon the shoulders of those whom it identified as the leaders of the walkout, thus making it clear that an equal, if not dominant, motive in determining to institute a layoff was direct retaliation for the employee's concerted activity.

We can only conclude, therefore, that the layoff was not motivated, as Respondent contends, by economic exigencies but that the financial effect of the wage increases was used as a pretext for a retaliatory layoff designed to discourage protected concerted activity.[5] By thus instituting the layoff, Respondent interfered with, restrained and coerced its employees in the exercise of right guaranteed by Section 7, in violation of Section 8(a) (1) of the Act.

Finally, even assuming that economic considerations [fol. 70] warranted a layoff, Respondent's selections therefor were in themselves discriminatory in nature. The three men who had openly conducted the concerted activity of demanding the raises were told that they were being laid off because of the cost of those impending raises.[6] At the time of their terminations, Respondent failed and refused to give the basis for their selection as the persons to be laid off, but instead gave an equivocal answer to Davis' inquiry as to whether seniority had been followed. The reasons offered at the hearing by Respondent's agents for selecting these three men for layoff lack credulity in view of the inconsistencies in the evidence advanced in support there,[7] and the speciousness of these

[5] See *Ellis and Watts Products, Inc.*, 130 NLRB No. 109.

[6] Respondent's witnesses testified that Davis and McKnight were told that "because of the cost of the pay raise and a drop in business they were being laid off," and that Harmon was told that "a cutback was necessitated by the cost of the raise and slow business."

[7] At the hearing(Respondent's witnesses gave various reasons for its selection of the employees involved, in the course of which

various and diverse reasons takes on added significance when viewed in light of the entire record.

[fol. 71] Accordingly, we find that the selection for layoff of only the leaders of the concerted activity, when considered in connection with the demonstrably false reasons advanced for their selection, leads to the inescapable conclusion that the dismissals were in fact made for reasons proscribed by the Act.[8] We find, therefore, that Respondent, in laying off Davis, Harmon, and McKnight, discriminated against them because of their concerted activity in violation of Section 8(a) (1) of the Act.[9]

2. By identical letters dated November 8, 1961, Respondent served notice upon Davis and Harmon[10] that

---

many contradictions appear. Thus, although in the past it has used seniority as a guide, it was denied that this was a consideration here, but it was then asserted that it was on the basis of relative seniority that 6, sometimes 5, sometimes 7, names were considered. Of these maximum of 7, the 3 selected were the senior, and admittedly there were 3 or 4 other employees with less seniority who were not even considered. Seniority aside, it is asserted that these three were not "hustlers" whereas, presumably, all others were. Yet each of the three had been granted raises within their relatively short tenure of employment, Harmon receiving one on the occasion of his transfer from the block department into ready-mix, allegedly because of his inability to do the work there. In addition it is admitted that, while working in the ready-mix department, Harmon's work was complimented by Moritz on several occasions. We have already noted that the alleged discontinuation of the sand department, in which McKnight worked, was contradicted by Respondent's own witnesses, and their allusion to a drop in business in the ready-mix department is refuted by the admitted necessity of assigning employees from other departments to operate the ready-mix trucks.

[8] See *Albon Poultry & Egg Company*, 134 NLRB No. 79; *Layton Oil Company*, 128 NLRB 252. Also see *Central Freight Lines, Inc.* 133 NLRB No. 32, at I. R., p. 20-23; *Trettenero Sand & Gravel Company*, 129 NLRB 610, 612.

[9] See *Gibbs Corporation*, 131 NLRB 955, footnote 1; *Sherry Manufacturing Company*, 128 NLRB 739. Cf. *Indiana Gas & Chemical Corp.*, 130 NLRB 1488.

[10] We find, in agreement with the Trial Examiner, that McKnight was recalled and subsequently discharged and that no unlawful conduct in connection therewith has been established.

they were no longer employable by the company, thereby converting their layoff into a permanent discharge. The reason given in the letter for such action was certain alleged misconduct vaguely referred to therein.[11] Respondent claims to have received information from employee Pate that Davis and Harmon committed the alleged misconduct while they were engaged in union membership solicitation. It made no effort to investigate the matter further but issued the dismissal letters relying solely upon an affidavit supplied by Pate covering the matters previously reported. Respondent's position is that its reliance [fol. 72] upon this information absolved it of any liability arising from the discharges effectuated by the letters.

Evidence presented by Respondent in support of its position consisted of testimony by Tawney to the effect that employee Pate reported to him the remarks referred to[12] and further reported that they were made on the occasion when Davis and Harmon, together, visited Pate's home for the purpose of soliciting union membership and authorization cards. Respondent also introduced as evidence upon which it based its activity the affidavit of employee Pate. The affidavit specifically was not offered to establish the truth or falsity of the statements contained therein. Nor did Respondent have Pate testify with respect thereto or make any attempt otherwise to prove the truth of the allegations in Pate's affidavit and report upon which it relied.

On the other hand, record evidence establishes that both Davis and Harmon were actively engaged in efforts to organize Respondent's employees on behalf of the Union after their layoff; that in the course of such activity

---

[11] "It has come to my attention that you made or condoned serious threats to damage property of the Company should the Union fail to win its election. Under such circumstances, I cannot reemploy you with our company."

[12] According to Pate's affidavit "If the Union doesn't get in, we're going to use some dynamite to make sure that those who didn't vote for it won't work either; we'll blow the gravel bin over and make sure that no one works." Tawney's version of what they are reported as having said differs in content but expresses a similar idea.

they did individually call upon employees in their homes; that they did not, however, call upon Pate together. Both Davis and Harmon categorically denied making the same or any similar remark as those attributed to one of [fol. 73] them,[13] and denied being in the presence of and hearing any similar remark allegedly uttered by the other. Their testimony in this respect is uncontradicted as Pate did not testify, and, as noted, no effort was made to establish the truth of his affidavit. Therefore, the General Counsel has presented uncontradicted evidence establishing that Pate's report of a threat is false and that Davis and Harmon did not engage in the alleged misconduct. On the basis of the evidence presented by the General Counsel, and the entire record before us, we can only conclude, and hereby find, that Davis and Harmon did not engage in the alleged misconduct.

While assuming no misconduct, the Trial Examiner, nevertheless, having held that the layoffs were not unlawful, rejected the General Counsel's argument that the doctrine of *Rubin Bros. Footwear, Inc.*,[14] was applicable here. He found that Respondent had an honest belief that Davis and Harmon had engaged in the alleged misconduct and that this was a sufficient defense to the discharges in the circumstances, and therefore its conduct was not unlawful. Moreover, the Trial Examiner concluded that even though Pate's report revealed to Respondent that Davis and Harmon were engaging in protected union activity, the evidence adduced was insufficient to establish that Respondent issued the letters of dismissal "because of their concerted or union activities." We do no agree with these conclusions. The *Rubin Bros* doctrine establishes that when, in the course of protecte activity, employees are accused of misconduct and a respondent takes action affecting their employment tenure based on

---

[13] The dismissal letters do not disclose which of the two was reported to have made the remark and which condoned it. Respondent's own evidence, as noted by the Trial Examiner, conflicts in this respect with Tawney testifying that Pate reported to him that it was Harmon and with Pate's affidavit stating it was Davis.

[14] 99 NLRB 610.

[fol. 74] a belief that the employee has engaged in misconduct, such an honest belief would be an adequate defense to a charge of discrimination for refusing to reinstate such employee *unless it affirmatively appears that such misconduct did not in fact occur.* As noted above, such affirmative proof is present here. Accordingly, Respondent's conduct in changing their status from that of layoff to a permanent discharge was not defensible on the basis urged.

It is undisputed, and Respondent knew, that the alleged misconduct was asserted to have taken place while Davis and Harmon were engaged in protected union activity, the solicitation of union membership and authorization cards. In view of this knowledge and in view of the fact that these employees were laid off discriminatorily because of Respondent's desire to rid itself of employees who it knew were leaders in the protected concerted activity, we can only conclude that, because of their union activity, Respondent seized up their purported misconduct as an excuse to convert the layoffs of Davis and Harmon into discharges. The preponderance of all the relevant evidence amply support the ultimate conclusion sustaining the complaint. Accordingly, we find that Respondent, by the discharge of Davis and Harmon on November 8, 1961, because of their union activity, violated Section 8(a) (3) and (1) of the Act.

The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth herein above and in the attached Intermediate Report occurring in connection with its operations as described in the Inter-
[fol. 75] mediate Report, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondent has engaged in and is engaging in certain unfair labor practices, we shall

order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. We shall also order that Respondent make each of the above-named employees whole for any loss of pay he may have suffered, because of Respondent's unlawful and discriminatory actions, by payment to each of them a sum of money he would normally have earned as wages from the date of such discrimination to the date of an offer of reinstatement, less his net earnings during said period.[15] The backpay will be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289.

Because McKnight has since been recalled and thereafter discharged for cause, we shall not order his reinstatement but shall direct that backpay be awarded to the date of his recall.

Conclusions of Law

1. Burnup and Sims, Inc., is engaged in, and during all times material was engaged in commerce or in a business [Fol. 76] affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union No. 172, Airlines Supply Technicians, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminating in regard to the hire and tenure of employment of Robert J. Davis, Joseph H. Harmon and John P. McKnight, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (3) and (1) of the Act.

4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

---

[15] *A.P.W. Products Co., Inc.*, 137 NLRB No. 7.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Burnup and Sims, Inc., West Palm Beach Florida, its officers, agents, successors and assigns shall:

[fol. 77] 1. Cease and desist from:

(a) Laying off, discharging, or otherwise discriminating against its employees for engaging in concerted activities for their mutual aid or protection;

(b) Discouraging membership in Local Union No. 172, Airlines Supply Technicians, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of its employees, by discharging employees or otherwise discriminating in regard to their hire or tenure of employment or any term or condition of employment;

(e) In any other manner interfering with, restraining, coercing its employees in the exercise of the right to self-organization, to form, join or assist any labor organization, to bargain collectively through a representative of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all of such activities.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Robert J. Davis and Joseph H. Harmon immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges and make whole said employees, and John P. McKnight, for any loss of pay they may have suffered by reason of the discrimina-
[fol. 78] tion against them in the manner set forth in the section above entitled The Remedy.

(b) Post at its offices and plants in Melbourne, Eau Gallie, and Cocoa, Florida, copies of the notice attached

hereto marked Appendix.[16] Copies of said notice to be furnished by the Regional Director for the Twelfth Region shall, after being duly signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Preserve and, upon request, make available to the Board, or its agents, for examination and copying, all payroll records, timecards, reports, social security payment records, and all other records and reports necessary to determine the amounts of backpay due under the terms of this Order.

(d) Notify the Regional Director for the Twelfth Region, in writing, within 10 days from the date of this Order what steps Respondent has taken to comply herewith.

[fol. 79]

Dated, Washington, D. C. JUNE 25 1962

Boyd Leedom, Member

John H. Fanning, Member

Gerald A. Brown, Member

(SEAL)

[16] In the event that this Order is enforced by a decree of the United States Court of Appeals, the notice shall be amended by substituting for the words, "Pursuant to a Decision and Order," the words, "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT layoff, discharge or otherwise discriminate against our employees for engaging in concerted activities for their mutual aid or protection.

WE WILL NOT discourage membership in LOCAL UNION NO. 172, AIRLINES SUPPLY TECHNICIANS, affiliated with INTERNATIONAL BROTHERHOOD of TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, and [fol. 80] HELPERS of AMERICA, or in any other labor organization of our employees by discharging our employees or otherwise discriminating in regard to their hire or tenure of employment or the terms or conditions of employment.

WE WILL offer to Robert J. Davis and Joseph H. Harmon immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and we will make them and John P. McKnight whole for any loss of pay suffered as a result of the discrimination against them.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective

bargaining or other mutual aid or protection or to refrain from any or all such activities.

BURNUP AND SIMS, INCORPORATED
(Employer)

Dated ..... By .....
(Representative) (Title)

[fol. 81] This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Ross Building, 112 East Cass Street, Tampa 2, Florida, (Tel.: 223-4623) if they have any questions concerning this Notice or compliance with its provisions.

[fols. 82-84] * * *

[fol. 85] BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Twelfth Region

In the Matter of

BURNUP AND SIMS OF MELBOURNE, INC.

and Case No. 12-CA-2156

ROBERT J. DAVIS, an individual.

Mayfair Cafeteria,
North Atlantic Boulevard,
Cocoa, Florida
Tuesday, December 12, 1961.

TRANSCRIPT OF HEARING

Pursuant to notice, the above-entitled matter came on for hearing at 9:30 o'clock a.m.

BEFORE:

ALBERT P. WHEATLEY, Esq., Trial Examiner

APPEARANCES:

FRANK JAMES KRUZICH,
and
JOSEPH V. MORAN,
Counsel for the General Counsel,
112 E. Cass Street, Tampa, Florida

RAY C. MULLER, Esq.,
and
WILLIAM FORD, Esq.
(Messrs. Fisher and Phillips)
26 Pryor Street, Atlanta, Georgia,
appearing on behalf of Respondent.

[fol. 86] PROCEEDINGS

* * * *

TRIAL EXAMINER: On the record.

MR. MULLER: Mr. Wheatley, prior to the introduction of the formal papers the Respondent will renew or press its pending motion with the Board for a continuance of this matter.

A request for continuance was filed with the Regional Director, a motion for reconsideration was filed with the Regional Director for continuance. An appeal was taken to the Board asking that the Regional Director's denial of the continuance be overruled. As a basis for the continuance we say this, there is an election at this Company pending and will be held on this Friday, day after tomorrow, or these days from now. The Employer earnestly urges that a hearing, an unfair labor practice hearing such as this where employee witnesses will be called will prejudice the Employer, both in the election and in the preparation of this "C" case, particularly in the preparation of this "C" case. The Employer is hindered, we feel, in the extent of interviewing that we may do among employee witnesses because of a necessity those employee witnesses must be questioned concerning Union activity to set up a proper defense in this case. If we do that we lay ourselves open not particularly to 8 (a) (1) charges but more specifically and more important to conduct which may affect the election which is going to be held this Friday.

* * * *

[fol. 87] TRIAL EXAMINER: It does not seem to me the Regional Director might have been a little bit smarter to put this over or put this representation case over and not hold them both the same week, but I can't grant Respondent's request for a continuance, there are too many maybes, maybe this case will affect the results of the election coming on Friday, there's too many maybes. I can't grant it on that basis. Motion denied.

* * * *

SAMUEL J. CASELLA,

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Kruzich) Please state your name and address for the record, sir. A Samuel J. Casella; I reside at 616 Maid Marion Lane.

Q Where, Mr. Casella? A Eau Gallie, Florida.

Q Mr. Casella, are you associated in any official capacity with Local 172 Teamsters? A Yes, sir, I am currently the Vice-President.

Q All right, sir. Mr. Casella, is the correct name of Local Union 172 Teamsters that as Local Union 172 Airline Supply Technicians, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America? A That's correct.

* * * *

[fol. 88] Q Now, Mr. Casella, of your own personal knowledge, with regard to employees of Burnup and Sims, were any Union Organizational meetings held? A Yes, there were.

Q When?

* * * *

A All right, it was on October, September 28th, excuse me.

Q September 28th, this year, 1961? A Yes, sir.

* * * *

Q All right. Now, you have stated that there was one Union Organizational meeting held on September 28, 1961. Were any others held? A We called several, yes, sir.

Q Were they held? A Yes, some people came.

Q All right, what dates? A The dates, exact dates I can't give you. They were all subsequent to the September 28th meeting. We tried on several occasions to get meetings up but we had trouble getting a—

* * * *

CROSS EXAMINATION

Q (By Mr. Muller) You say you held your first actual meeting with a group on September 28th, is that right? A Yes, sir.

Q And that was held down in your Union Hall in Melbourne? A No, sir, Eau Gallie.

[fol. 89] Q In Eau Gallie? A Yes, sir.

Q I see, and how many were there at that first meeting?

MR. MORAN: I object, Your Honor; it is completely immaterial.

He may answer it.

TRIAL EXAMINER:

A Well, I will have to give you an estimation; I can't give you an exact figure.

Q Surely, were you there, first of all? A Yes, sir.

Q All right. A I think we had about 14 people, 14 or 15.

Q All right.

TRIAL EXAMINER: From Burnup and Sims?

THE WITNESS: Yes, sir.

Q What time was that meeting held, day or night? A It was in the evening.

Q In the evening? A Yes, sir.

Q Okay. Now, had any cards been signed prior to that meeting? A No, sir.

Q No cards at all signed? A No, sir.

Q All right. Then, subsequent to that—well, put it this way. Did you start signing cards at that meeting? A Yes, sir, we did.

Q And subsequent to that time were cards signed? A Yes, sir, they were.

* * * * *

[fol. 90] Q To your knowledge, were cards signed outside of any of these Union meetings you held? A Oh, yes.

Q Where, at what locations that you know of? A I can't answer that. I know some were signed in homes; outside of that I don't know.

Q I see. Then, to the best of your knowledge employees went around to others homes and had cards signed, is that right? A This was done.

Q I see, all right. You have no knowledge that any cards were passed out or signed down at Burnup and Sims Company Office or anything like that, have you? A I have no knowledge of that, no, sir.

* * * *

ROBERT JOHN DAVIS,

the Respondent herein, being first duly sworn, was examined and testified in his own behalf as follows:

DIRECT EXAMINATION

Q (By Mr. Kruzich) State your name and address for the record. A Robert John Davis, 1407 Woodward Avenue, Orlando, Florida.

Q All right. Were you ever employed by Burnup and Sims, Respondent and Employer in this case? A I was.

Q All right, sir. Please tell us the dates of your employment as near as you can recall. A Approximately, I was hired in July.

Q July? A July.

[fol. 91] Q What does this mean? A Pardon?

TRIAL EXAMINER: July, what year?

THE WITNESS: 1961.

Q You are currently employed by Burnup and Sims? A I'm not.

Q All right. What is the date you left the employment of Burnup and Sims? A September 29, 1961.

Q All right. While you were employed at Burnup and Sims what was your job? A I run a ready-mix truck, truck driver.

Q What type of truck did you drive? A Truck that makes ready-mix cement.

Q What did you call that truck? A A ready-mix truck.

Q Was that the only type of truck you drove during the course of your employment? A It was not.

Q What other type of truck or trucks did you drive, if you can recall? A I drove a pickup, I drove a flatbed, drove a dump truck.

Q All right, sir, and what occasions would you drive these other trucks? A When I was asked to do so by the dispatcher or—and in the course of, I didn't have a load going out on my ready-mix truck to fill in the time that I had to work.

Q All right. How often did this occur? A You mean by the day or by the week? A I mean, did this occur frequently that you would drive other trucks? A I would say it did.

• • • •

[fol. 92] Q All right, sir. Mr. Davis, of your own knowledge, did truck drivers ever work in other departments? A They did.

Q Give us an example, if you can recall. A I, myself, worked at the garage in the back at the garage. I also worked over at the warehouse.

• • • •

MR. MULLER: I am going to object to any more of this. I don't see the materiality. Maybe there is but I don't see it.

TRIAL EXAMINER: So far I don't either.

MR. KRUZICH: If I am allowed to pursue this line of inquiry I believe I can connect it up, Mr. Wheatley.

TRIAL EXAMINER: Upon your assurance go ahead.

MR. KRUZICH: All right.

Q While you were employed by Burnup and Sims, Mr. Davis, to the best of your recollection what were the average number of hours you worked per week? A I'd say the average was 50 hours a week.

Q Now, sir, during the last month of your employment did that figure remain about the same, if you can recall? A I would say it did.

[fol. 93] Q All right, sir. When you were first employed by Burnup and Sims what was your rate of pay per hour, if you can recall? A $1.35.

Q An hour. When you left their employment? A $1.35 an hour.

Q Now, directing your attention back to the time you left the employment of Burnup and Sims did you report for work for Burnup and Sims on a Wednesday, September 20, 1961? A I did.

Q Did you work that day? A I did.

Q As best you remember what, if anything, did you do when you left work that day? A When I left work that day we had a meeting down in front of the shop.

MR. MULLER: This date was September 20th?

MR. KRUZICH: September 20th.

MR. MULLER: All right.

MR. KRUZICH: After he left work, counselor.

Q You said "we had a meeting"? Who had a meeting? A The other employees and myself.

Q What other employees? A The other employees that worked for Burnup and Sims, the ready-mix truck drivers and other truck drivers.

Q Well, was it just truck drivers? A There was other men there, warehousemen, I believe.

[fol. 94] Q How many employees attended this meeting? A Approximately 19.

Q About how many, sir? A I'd say approximately about 19.

Q All right. Mr. Davis, where did this meeting take place? A Directly across the railroad tracks in front of the office.

* * * *

Q Who called this meeting, Mr. Davis? A I did.

Q All right, sir. What was the purpose of your calling this meeting?

TRIAL EXAMINER: What do you mean by called the meeting?

MR. KRUZICH: Who instigated this meeting?

A I did.

Q All right, sir. What was the purpose of this meeting?

MR. MULLER: I object.

TRIAL EXAMINER: Sustained. What did you do in calling the meeting, how did you go about it?

THE WITNESS: I talked to some of the employees and asked them if they thought they was getting a fair wage.

[fol. 95] Q What else was said, if anything, if you recall? A And I asked them if they thought they wasn't I would like to call a meeting and talk it over with them.

Q Did you call that meeting? A I did.

Q What meeting was that? A The one on September 20, 1961.

Q All right. Was anything decided at this meeting? A It was.

Q All right. To the best of your recollection what, if anything, was decided at this meeting?

MR. MULLER: Objection.

TRIAL EXAMINER: You may answer.

A Well, it was decided that we would ask for a wage increase and I asked the men what they thought would be an adequate wage increase and it was decided on a 15-cent an hour increase, and I asked them if they wanted me to be their spokesman, or that if there was someone else that they felt they wanted for a spokesman that they could have him for a spokesman. The men agreed that if I was willing to go ahead with it that I would take the place of spokesman.

Q What else was decided, if anything, if you can recall? A So, I told the men if that's the way they felt to report for work tomorrow morning at 6:00 o'clock.

* * * *

Q Mr. Davis, did you report for work at Burnup and Sims the following day? A I did.

[fol. 96] Q All right, sir. Mr. Davis, to the best of your recollection tell us what happened, if anything, when you reported for work that day? A Well, I reported for work, I was there, got to the Plant the next morning about a quarter of 6:00 and all the men that had participated in this meeting the night prior started coming in, some came in at 6:00 and they weren't all there until around five minutes after 7:00. I told the men not to punch their clocks but to get their ready-mix trucks, bring them over and park them and leave the keys in them and then come out in front of the office in a group, which they did.

Q All right, sir, continue. A And, a few minutes later Doyle Tawney—

Q Who is Doyle Tawney? A Doyle Tawney is a supervisor.

Q Does he have the authority to hire and fire? A To the best of my knowledge he does.

MR. KRUZICH: Will you stipulate, counsel, that Doyle Tawney is a supervisor?

MR. MULLER: Yes.

MR. KRUZICH: Stipulation received?

TRIAL EXAMINER: Yes.

MR. KRUZICH: All right.

[fol. 97] Q Please continue. A Doyle Tawney got out of his car, he looked over to the group, he walked over to the group and he says "what's going on" and nobody said anything right away. He said "all right, this group should have a spokesman," and at that point I stepped forward and I said, "I'm the spokesman for the group," and he says, "well," he says, "what do you want," and I says, "the men asked me as their spokesman to ask for a wage increase," and he says, "what do you consider a fair wage increase," and I says, "15 cents an hour." He didn't say anything for a few minutes, a few seconds and he says, "well," he says, "I don't know if I'll give you 15 cents," he said, "I can give you 15 cents but I can also hold you men to 40 hours," and I said to him, I says, "well," I says, "we'll accept the 15 cents an hour increase but," I says, "I don't believe you can hold us men to 40 hours." He says, "I can hold you to 40 hours if I have to bring in 10 men to do it," and I didn't say any more at that point. He went ahead with his conversation.

Q Now, to the best—

TRIAL EXAMINER: You say he went ahead with his conversation? What did he say?

THE WITNESS: Oh, it was working conditions, that under the present working conditions and the way work was coming in right now they just couldn't afford to give use the 15 cents an hour increase, and one of the men asked him a question about some garage work on a truck [fol. 98] and he answered him and about that time he turned around and walked away and went into the office.

Q Mr.—
MR. KRUZICH: Excuse me, sir.
Q Mr. Davis— A Yes.

Q Do you recall if Mr. Tawney said anything about raises being cancelled? A He did.

Q What did he say? A He says, after he said that he could give us 15 cents but he could hold us to 40 hours and he said also that there would be some raises that would have to be eliminated and I believe one of the men said "you're not referring to me" and he didn't say anything.

Q Continue, if you can recall what happened, if anything, when Doyle Tawney walked away. A Well, he went into the office. Within a few minutes time he walked out of the office and Carl Moritz walked up.

Q Who is Carl Moritz? A He's the Manager.

Q Can he hire and fire, sir?

MR. MULLER: We will stipulate he is a supervisor.

A He can.

Q Continue. A And he walked over to Carl Moritz, I believe he was in his Ranchero pickup and he had a conversation with Mr. Moritz and he walked back over to the group and stated that Carl Moritz wanted all the men to come over to the warehouse, he wanted to talk to them, and the men, I acknowledged them and told them we would come over.

[fol. 99] Q Mr. Davis, excuse me, at this point to the best of your recollection how many men were in this group? A Approximately 19.

Q All right, continue please, sir. A As I say, I acknowledged them and the men did also and we went over to the warehouse, some of us walked, some of us drove our cars over. We went into the warehouse, we took a position on, that would be the west, Carl Moritz was there and Doyle Tawney was there and the group assembled. They were not too far apart, some standing, some sitting down, and he says "all right," he says, "now, I want the spokesman to walk out here," which I did, and he says, "is there anybody else here that's going to stand up with this man," and at that time Joe Harmon walked out beside me and Carl Moritz says, he says, "now, I

want to ask you," he says, "now, what do you base this here meeting about," or, "why did you feel you should have a wage increase," and I says, "well, due to your competitor," I says, "they are making 15 cents an hour more than we are and the cost of living here in this particular territory is, I think it demands it, a wage increase," and he didn't say anything right away, and I didn't either, and he stepped back and he started giving, talking to the men that he wants, about a month or so previous that he was trying to get us a wage increase even though there was none ever given to us and as far as I knew the men had worked for the same wage for—for a length of time.

Q All right, continue. A And he went on with his conversation and in about the same general thing and after about possibly 20, 30 minutes he says, "now, I'm going to ask you men," he also made a statement in there, he says, "some of you men have been loafing on the job," [fol. 100] and he made a direct statement to me, "you, above all," and I said back to him, I said, "well, I doubt that," and he said, "all right, I'm going to tell you there's not going to be any hard feelings and everything is going to be forgotten. Now, I want you men to go back to work," and nobody moved, and he says, "well," he says, "I'll put it this way, then. All the men that want to go back to work step over here and the rest of you men that don't want to go back to work you will voluntarily quit," and at that point I says, "well, I'm still under the same opinion as I was when I started this thing," and he said, "how about the rest of you men," and nobody said anything, or nobody moved. He says, "well, there's the door." So, I just walked on by him and walked out the door and the rest of the men followed me.

Q Well, Mr. Davis, at this meeting in the warehouse to the best of your recollection please tell us, if you can recall, what Management representatives were present, sir? A Doyle Tawney, Carl Moritz and young Walter Burnup.

Q Who is Walter Burnup? A To the best of my knowledge he has a partnership in the Company.

Q Who told you this? A Carl Moritz.

Q Where did he tell you? A At a meeting in the yard.

Q When? A About a month prior.

Q All right, sir. Anybody else present that you can recall? A No, I don't remember if there was.

Q All right. You stated you walked out of the warehouse? A That's right.

Q Now, to the best of your recollection what occurred, if anything, to yourself and the men when you walked [fol. 101] out of the warehouse? A Well, after the men got outside there was mention made that some of the men go down to the Coffee Shop and another man made a mention, he said, "I think we should have the Union, a Union man here as representation," and I said, well, I would go down and see if I could get a hold of one, and I asked Johnny McKnight, and we left the premises and went down to Teamsters Local 172 in Eau Gallie and we couldn't find anybody there. Then, we took phone numbers of the various officers off the door, drove up to a gas station telephone and tried to call these people and we couldn't get a hold of them. At that point I said that we better get back down there and see what's happening, and we did drive back down there and as we were pulling in I noticed Carl Moritz talking to the group of men outside and I got out of the car and walked towards them. He seen us drive up. He was looking at us.

Q Who drove up? A Pardon?

Q Who drove up? A Myself and Johnny McKnight.

Q You say Carl Moritz saw you drive up? A He did.

Q And get out? A He did.

Q All right, whose car did you use? A Johnny McKnight's.

Q All right, continue, sir. A And I walked over to the group of men he was speaking to and I didn't say anything and he was talking on the working conditions and he also said that he was proud of the men for doing what they done in a group and he was picking out individuals saying "when you came here for a job I gave you a job, I didn't ask you what you'd done, where you'd been, or anything like that; I gave you a job," and the, his

[fol. 102] whole specific conversation during that time was on him trying to get us this here raise previous in a previous time, and after he got done with his—

Q What previous time are you talking about, sir? A Within three months previous to this here happening.

Q All right. A And when he got down with this conversation he walked over to—well, he approached me and he said, "now, are you still willing to go ahead with what you started or do you men want to go back to work?" I asked, I told Mr. Moritz, I says, "Mr. Moritz, you offered us no compromise at all," and he got a disgusted facial expression and he turned around and walked away from me. Then, he turned back and he said, "you will have your 15 cents an hour increase within 30 days," and he walked away towards the office.

Q All right. Mr. Davis, to the best of your recollection did Mr. Carl Moritz say anything further at this meeting? A He did not.

* * * *

Q All right, sir. Mr. Davis, to the best of your recollection did you ever again attempt to contact Teamsters' Local 172? A I did.

Q All right, when? A September 20th—I contacted him the next day, the 22nd.

Q Mr. Davis, what, if anything, occurred as a result of this contact? A I went down there with the thought in mind of, to see what procedure was to get a Union organized, and they informed me what I had to do, and they appointed me as the man to run this here, to get this organized at Burnup-Sims.

[fol. 103] Q Was anybody with you? A On which day was that?

Q When you went to contact the Teamsters, on the second occasion? A On the second occasion?

Q Yes, sir. A No, I was by myself.

Q All right, continue. A And they asked me to appoint three men to talk to other employees, what they thought of having the Union in there and if they could, that if they wanted better working conditions that they would be further ahead to have the Union in there.

Q All right. A And that's about—

MR. MULLER: Who was this conversation with, can we find out?

A It was with Sam Cassella and John Riff.

Q Who is John Riff? A John Riff is President of Local 172.

Q Sam Casella previously testified. Mr. Davis, was there a meeting of Burnup and Sims employees with the Union representatives on September 28, 1961? A Would you say that question again?

Q Was there a meeting of Burnup and Sims employees with the Union representatives on September 28, 1961? A There was.

Q All right. Who attended this meeting, do you recall? A The amount of men?

Q Yes, sir. A 11 men.

Q What did you do, if anything, at this meeting, if you can recall?

TRIAL EXAMINER: Were you there?

[fol. 104] THE WITNESS: I was. What happened at this meeting?

Q Yes. A I—the purpose of calling this meeting—

MR. MULLER: Objection.

Q Not the purpose. A Well, at the meeting—

Q What happened? A John Riff and Sam Casella talked to the men and explained to them how a Union was organized and what to expect from the Union.

Q Were authorization cards signed? A They were.

Q Mr. Davis, were authorization cards given to be passed out at Burnup and Sims, if you recall? A They were.

Q All right. I believe, sir, that you previously testified that you were to be the leader of this organizing, is that correct? A I was.

Q Did anybody tell the other employees this fact at this meeting? A At which meeting are you referring to?

Q This Union organizational meeting. A They were.

Q What were they told?

MR. MULLER: Mr. Wheatley, I am going to object to this as hearsay.

* * * *

TRIAL EXAMINER: Well, the objection is overruled but I would like to know from you what your position on Mr. Davis is. I notice you deny that he was terminated.
[fol. 105] MR. MULLER: That's right, at the time he was laid off our position was that it was a temporary layoff. As the evidence will show we did, in fact, hire back one of the people we did lay off, it was temporary.

• • • •

Q All right. Now, Mr. Davis, on this same day—this is a Friday, September 29, 1961, what happened, if anything, with regard to your employment status at Burnup and Sims? A I was fired.

Q All right. Mr. Davis, to the best of your recollection please tell us the circumstances surrounding your leaving the employment of Burnup and Sims upon this date. A I reported to work September 29th as usual and I picked up my, I went out on 2 or 3 deliveries. I don't recall exactly how many, I know sometime that morning I picked up my regular paycheck and I had, did the same thing in the first part of the afternoon. Around 5:00 o'clock I got a call to take a delivery out to Christine's Restaurant, which I did. Johnny McKnight rode in my truck out there with me to learn how to drive a ready-mix truck and how to operate one. After I made my delivery and washed my truck out we started back. We got a call over the radio on the truck that, from the dispatcher—

Q Who is the dispatcher? A Andy Minor.

• • • •

Q All right, continue. A And as I say, he called over the radio and told us that Carl Moritz wanted to [fol. 106] see us in his office when we got back, got in. So, I drove in the yard and pulled up by the dispatch office, went in and asked Andy, asked what is this all about and he said he didn't know. So, I says, "all right, my truck is washed out, I'll take it over and park it and go and see him." So, we walked in this office over there.

Q You say we, who is we? A John McKnight and myself.

Q I see. A And I says, "Mr. Moritz," I says, "I understand you want to see us," and he says, "that's right, I do," and he says, "I'm going to have to lay you boys off on account of the wage increase I was asked for. I have to cut back in my working force," and now I said, "well, according to Company regulations," I says, "I thought that was done according to seniority," and he didn't say anything right away, and I says, "I think this is a personal thing," and he says, "oh, no, it's not." I says, "well, will you give us a statement in writing to take to the unemployment office," and he says, "no," he says, "I think your check stubs are substantial," and at that point I didn't, there was no reason to argue with the man. So, I walked off.

TRIAL EXAMINER: Check stubs are substantial or check stubs sufficient?

THE WITNESS: I believe he said, "your check stubs were substantial to take to the unemployment office."

• • • •

[fol. 107] Q On this date of September 29, 1961, the day you left the employment of Burnup and Sims, of your own personal knowledge were there any other Burnup and Sims employees laid off on this date? A On September 29?

Q Yes. A Two other men besides myself.

Q Who were these men? A Joseph Harmon and John McKnight.

Q Anyone else that you can recall? A No, sir.

Q All right. Then, sir, on this date of September 29, 1961, of your own personal knowledge were there any other Burnup and Sims employees employed on this date with shorter seniority than yourself, McKnight and Harmon? A There was.

Q Were these men truck drivers? A They were.

Q Were there any other employees that you can recall outside of truck drivers with shorter seniority? A I don't know.

Q Pardon? A I don't know.

Q All right. Now, then, sir, you stated that there were other employees employed on this day with shorter

seniority than yourself, Harmon and McKnight? A There was.

Q How many others, as best you can recall? A I would say approximately 4.

* * * *

CROSS EXAMINATION

Q (By Mr. Muller) Mr. Davis, you said, I think, [fol. 108] in answer to a direct question that you were hired in July, is that right? A Approximately.

Q Do you remember when in July you were hired? A I believe it was towards the end of the month.

Q Towards the end of the month? A Yes, sir.

Q So, when you were discharged you had been there about two months, is that right? A I'll remember—

Q Or layed off, you were there about two months, is that right? A As the way you put it I would say I was hired there around sometime during the first part of July.

Q First part of July? A Right.

Q I see. So, if I told you that our records show you were hired on the 18th of July would that reflect, refresh your recollection as to when you actually were hired? A I would say that would be close.

* * * *

Q Now, after you were hired, Mr. Davis, about the 18th of July of this year, were you promised an increase in your rate? A I was.

Q You started at $1.35, is that right? A I did.

Q And how long was it supposed to have been before you went, got an increase? A I had to ask for my increase.

Q Did you get it? A No.

Q All right. Who did you ask? A Doyle Tawney.

Q And what did he tell you? A He said I'd be getting it within a week.

Q And when was this? A Oh, approximately a week prior to September 20th.

[fol. 109] Q So, you never did get your,—a week prior to September 20th? A Right.

Q So, at the time you were laid off on the 29th, that was about two weeks before your actual layoff, wasn't it? A Yes, sir.

Q So you started at $1.35 and you were laid off at $1.35, right? A Correct.

* * * *

Q All right. The first contact you had was when Doyle Tawney drives up after you all are in front, is that right? A Correct.

Q All right, and Doyle drives up and approaches the group and says, "what is the trouble," is that right? A He said, "what's going on?"

Q "What's going on," okay. Who answers him, if anyone? A Nobody did right then.

Q Nobody answers him right then. Well, what does he do, repeat himself, then? A No, he said, "is there a spokesman for this group?"

Q Doyle says, "is there a spokesman," What is said then? A I stepped out and said, "I was."

Q All right, and what does Doyle say? A He says, "well, what's the trouble?" He says, "why ain't you men working," or, "why are the trucks parked out there," and he says—and I told him the reason of it was the trucks weren't going to move then—I'll rephrase that. I said, "the reason we're out here is that the men asked me to be spokesman to ask for a wage increase."

* * * *

[fol. 110] Q I want to know what his response was. I believe you testified on direct examination that when you said you, the Company can't hold us to 40 hours, Doyle's response was, "well, we can't afford 15 cents an hour." A No.

Q No. A He said, "I know I can hold you at 40 hours if I have to bring 10 men in to do it."

Q When, if ever, in this conversation did he say he couldn't afford it? A I don't remember if it was before or after.

Q Before or after what? A After he said that he could hold us to 40 hours if he had to bring 10 men in to do it.

Q But, you do recall him saying that he couldn't afford it? A At the present time that—I don't recall him saying anything that—

Q I see. Do you recall him saying that if he had to give 15 cents he was also going to have to reconsider some of these raises that were under consideration? A He said that.

• • • •

Q Okay. So, you go over to the warehouse, What happens at the warehouse? A The men are assembled in a group and he says, "all right," he says, "I want the—" Carl Moritz was standing in front of the group along with Walter Burnup and Doyle Tawney and he says, "all right, now, I want the spokesman to step out here in front," which I did, and he asked, "is there anybody else that will step out with him." Joseph Harmon did that. He says, "all right," he says, "on what basis [fol. 111] do you figure you have a wage, you should get a wage increase."

• • • •

Q Okay. At that point did Carl tell you, Carl Moritz tell you that he had been trying for some time to get a wage increase authorized? A He did.

Q All right. Did he tell you at that time that if a wage increase were granted there was going to have to be more cooperation around the place? A I don't remember.

Q You don't remember that. Do you remember him telling you that you were one of the ones that had been particularly loafing on the job? A I do remember that.

Q He did tell you that? A He did.

• • • •

Q Okay. If I understand your testimony, he was telling them that he was proud of them for having walked out, is that what he said? A He was proud of the men sticking together.

Q Sticking together? A Right.

Q Okay. What exactly did he say in that connection?

A He was surprised at what was taking place and that he was proud of the men sticking together.

• • • •

Q The whole group was there, okay. Now, in this group conversation outside the warehouse who else was [fol. 112] doing, talking besides you? Did Jim Wagner get in the act and do a little talking? A I don't remember.

Q You don't remember, Billy Allewine? A I believe Billy did have something to say.

Q Bobby Allewine? A I don't remember.

Q You don't remember them talking? A No.

• • • •

Q And the first Union meeting that's held is held September 28th, is that right? A Correct.

Q And this walkout occurred on September 21st? A Correct.

Q Okay, and on September 28th is the first time that cards are signed, is it not? A Correct.

Q Okay. Now, where did you go, Mr. Davis, to get these cards signed? A At the Teamsters Local 172 in Eau Gallie.

Q All right, and after you got the cards you, yourself, became active, did you not, in having other people sign cards? A I did get other people to sign cards.

Q All right. Where did these people sign cards that you got to sign cards?

MR. KRUZICH: Objection.

TRIAL EXAMINER: Overruled.

A The ones that I got signed was not on Company property.

[fol. 113] Q They were not on Company property? A Correct.

Q You sure of that? A I'm positive.

Q All right. They were away from Company property? A Correct.

• • • •

Q Now, on September 29th you were out on a job and McKnight was driving as a passenger, is that right? A Correct.

Q What kind of a job was this? A I was ready-mix truck driver.

Q You were delivering ready-mix to a job? A Right.

Q And who assigned McKnight to your truck? A I don't know.

Q You don't know who assigned him to your truck? A I asked John McKnight if he had an authorization to go with me. He said he had and I asked him why and he says the reason was that he had got permission, and I took him at his word, and that the reason he went with me was to learn how to operate a ready-mix truck.

Q I see. A I didn't question him any further.

Q And McKnight was the one you had driven down to the Union Hall with, wasn't he? A Correct.

Q I see, and before you would let McKnight ride you questioned his authority to go with you, or where he got his authority? A I did.

Q Okay. So, you and McKnight are out on the job and you get a call from Andy Minor, who is a dispatcher, and [fol. 114] he gives you the order that Carl Moritz wants to see you? A Correct.

* * * *

Q And if I understand your testimony, Moritz tells you, "I'm going to have to lay you off because of this wage increase?" A Correct.

Q Okay. Does he give you any other reason for laying you off at this time? A No, sir.

* * * *

Q Okay, and so when you are finally laid off he gives for his reason the cost of the raise, is that right? A Correct.

* * * *

TRIAL EXAMINER: The objection is overruled, let's find out who said what, when and where.

Q The Company, according to your testimony, refused to reinstate you because of a serious threat, is that right? A They said I made against the Company.

Q That you made against the Company. Do you know what that serious threat is that the Company says you made against it? A I do, now.

Q What is it? A That I threatened to use, to dynamite some sand silos.

Q Did you? A No, sir.

[fol. 115] Q You did not. Did Mr. Davis, or Mr. Harmon in your company make that threat? A No, sir.

Q You're sure of that? A I'm positive.

Q I show you what I have marked as Respondent's Exhibit 1 for identification purporting to be a carbon copy of a letter dated November 8th addressed to Robert Davis and ask you whether or not you have ever seen the original from which that carbon was made? A I have seen the original.

Q That was sent to you, was it not? A It was.

Q All right.

OFFER IN EVIDENCE

MR. MULLER: We will offer as Respondent's Exhibit 1 for identification as Respondent's Exhibit 1 in evidence and ask leave to submit a second copy. I have only got the one.

TRIAL EXAMINER: Any objection?

MR. KRUZICH: I have no objection.

TRIAL EXAMINER: The document is received.

(Thereupon, the document above referred to was received in evidence as Respondent's Exhibit No. 1)

[fol. 116] Q Now, you say you did receive Respondent's Exhibit 1? A Yes.

Q The letter, and you say that you never did make threats to do these bad things? A I never did.

Q All right. Did you ever correspond with the Company or correspond or communicate with Mr. Moritz or Mr. Tawney in any way concerning this letter? A I never talked to anybody after I was discharged outside of the following Monday.

Q I see. A Outside of Walter Burnup that one night.

Q I see. So, although you were the spokesman for this group during a meeting outside the Plant the night before, a meeting during the morning in front of the Plant, a meeting in the warehouse, a meeting outside the ware-

house, the representative that goes to the Union and the spokesman throughout you still didn't talk to anybody from the Company when you got these allegations against you, is that right? A Correct.

* * * *

TRIAL EXAMINER: Did you ever answer this letter?

THE WITNESS: No, sir.

TRIAL EXAMINER: Any reason why you didn't answer it?

[fol. 117] THE WITNESS: No, sir, there's no reason.

TRIAL EXAMINER: You realize the first paragraph of this letter says "when you were laid off on September 29th it was with the understanding that business in your particular job was slow." Did somebody tell you that?

THE WITNESS: Nobody told me that, no.

TRIAL EXAMINER: You weren't told that at the time you were discharged?

THE WITNESS: No, sir.

TRIAL EXAMINER: Did you ever tell the Company you were not told that?

THE WITNESS: No, sir.

TRIAL EXAMINER: Did you ever tell anybody?

THE WITNESS: The men I talked to, I mean—

TRIAL EXAMINER: I mean, connected with the Company?

[fol. 118] THE WITNESS: No, sir.

TRIAL EXAMINER: Why not?

THE WITNESS: Well, I was, as I say, I made the charge with the National Labor Relations Board and I figured they could handle the case better than I could.

TRIAL EXAMINER: Did you take the letter to the Labor Board?

THE WITNESS: To what effect?

TRIAL EXAMINER: Did you take this letter to the Labor Board?

THE WITNESS: It was showed to the representatives from the Labor Board.

TRIAL EXAMINER: Did you tell them it was not true?

THE WITNESS: I did.

TRIAL EXAMINER: Now, at the time you were laid off were you told anything about you would get first [fol. 119] call on any job that became available?

THE WITNESS: When I was laid off I was not.

TRIAL EXAMINER: Did you say anything to Mr. Moritz about that when you got the letter?

THE WITNESS: About what?

TRIAL EXAMINER: The fact that the letter says you were told you would have first call?

THE WITNESS: I got the letter after I was laid off.

TRIAL EXAMINER: I know that, after you got the letter did you say to Mr. Moritz it was wrong?

THE WITNESS: I never talked to Mr. Moritz after that, outside of that following Monday.

TRIAL EXAMINER: Did you ever talk to anybody connected with the Company concerning these threats?

[fol. 120] THE WITNESS: I did.

TRIAL EXAMINER: Before or after you got the letter?

THE WITNESS: After I got the letter.

TRIAL EXAMINER: Who did you talk to?

THE WITNESS: Young Walter Burnup.

TRIAL EXAMINER: When?

THE WITNESS: The same night, November 17th.

TRIAL EXAMINER: That's where you met him in the bar?

THE WITNESS: Correct.

TRIAL EXAMINER: Well, then, you haven't given us the entire conversation in the bar then with Mr. Burnup.

THE WITNESS: I forgot it, that part of it.

[fol. 121] TRIAL EXAMINER: What was said about that part of it?

THE WITNESS. I said, "do you know anything about the threats or the letter I got saying I made serious threats toward the Company," and he said, "no."

TRIAL EXAMINER: I don't know quite how to put this question but it's pretty apparent this man is saying, Mr. Moritz is saying in this letter that because of threats he wouldn't put you back to work regardless of why you

were laid off, and yet you didn't go to Mr. Moritz. Now, why not?

THE WITNESS: As I say, I thought representatives from the National Labor Relations Board could handle it better than I could.

* * * *

REDIRECT EXAMINATION

Q (By Mr. Kruzich) . . .

* * * *

Q Now, think real carefully about this point. When you received this letter had you already been apprised of the fact that a contention was being made that you had threatenend that you had made threats to dynamite the Employer's property and this was being investi-
[fol. 122] gated? A Before I got that letter?

Q Before you got this letter. A I heard men talking about it.

Q Which me? A Joseph Harmon, John McKnight and Sherman Franks.

Q What did Joe Harmon say to you, was this before you got the letter? A Before I got the letter.

Q What did Joe Harmon say to you? A He says, "I heard a rumor," and, "that you're—" I didn't know exactly how he said it, now. He said, "I heard a rumor that you're going to blow up the Company," in a joking sort of way, and I said, "what do you mean?" He said, "there's been rumors going around from the men I talked to." Evidently, I surmised he talked to the ready-mix truck drivers since he was in that type of work, that I made threats against the Company that I was using dynamite to blow up the sand silos.

Q Excuse me, let me ask you this. Did Harmon say the Government Agent had been around, or a Government lawyer? A He did.

Q Did he say the Government lawyer was investigating this charge, the allegation that was made? A He did.

Q All right. Now, you received this letter after Harmon told you this? A Correct.

Q All right. Now, when you received this letter, this wasn't the first time this was brought to your attention, was it? A I don't understand the question.

Q This wasn't the first time that you were being notified that you had made threats or somebody was charging you with making threats, was it? A Joseph Harmon and John McKnight both told me someone had signed [fol. 123] affidavit to the effect I had made a serious threat against the Company.

Q So, you already knew that when you received this letter? A Correct.

Q So, you were aware of the fact the Government was investigating this? A Correct.

Q Let me ask you something. When you received this letter from the Company did it come as a surprise to you? A No, sir, I wouldn't say it did.

Q All right. Now, why didn't you answer this letter? A As I say, I felt the representatives from the National Labor Relations Board could handle it better than I could.

Q Did you thing there would be any point in answering this letter? A I didn't se any point at all.

Q Why didn't you answer the letter? A Well, if they sent a letter to me like that in the first place and the letter was a lie to me if I wrote an answer back to the letter and they sent correspondence back to me it would just, to me, it would be another lie.

* * * *

Q All right, who was the individual you were told signed this affidavit? A Lyle Pate.

Q Do you know Lyle Pate? A I do.

Q Who was Lyle Pate? A He was a mechanic back in the garage.

Q He was a mechanic. Do you know if he still is? A As far as I know he is.

* * * *

[fol. 124] Q All right. Now, Mr. Davis, you testified on cross that you went to other employees' homes, is that correct? A Correct.

Q To get Union cards signed? A Correct.

Q The employees you went to, employees' homes you went to get — strike that. Mr. Davis, did you ever tell

Lyle Pate or anyone else that you would damage Company property? A I did not.

Q Where you ever in the presence of anyone who made threats to damage Company property, either to Lyle Pate or anyone else? A No, sir.

Q Let me ask you this. Do you know of anyone whoever made threats of damage to Company property? A No, sir.

* * * *

MR. KRUZICH: Mr. Trial Examiner, I would like to ask a question. I'm not too sure whether you asked it or not, though. Let me — excuse me if it's repetitious.

Q When you first met Doyle Tawney on the morning of the 21st after all you men had grouped together did Tawney say that he would cut the raises that were due if he had to give you the 15 cents or did he say he was going to have to consider cutting the raises? A He would have to eliminate some raises that were now in effect.

Q Did he make this statement all by itself or was this in conjunction with if he gave you the 15 cents? How did he make the statement? A "If I give you 15 cents I would have to eliminate some raises that were now in effect."

[fol. 125] TRIAL EXAMINER: You know that doesn't make any sense, don't you?

THE WITNESS: It seems ridiculous to me, too.

* * * *

Q In the warehouse you said that Mr. Moritz stated to the group he'd been trying to get a raise for the employees for some time, is that correct? A Correct.

Q Did Mr. Moritz mention how long he had been trying to get this raise? A I think it was—well, I'd say it was 3 months.

* * * *

JOSEPH H. HARMON, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Kruzich) State your name and address for the record. A Jospeh H. Harmon, 631 Cable Lane, Ft. Malabar, Florida.

Q All right, sir. Were you ever employed by Burnup and Sims? A Yes, sir.

Q All right, when? A June the 28th to September the 29th.

[fol. 126] Q All right, sir. What was your job when you were hired? A Truck driver.

Q When you left the employment of Burnup and Sims? A Truck driver.

Q What type of truck did you drive? A I drove a ready-mix truck.

Q To the best of your recollection was that the only type of truck you drove during the course of your employment with Burnup and Sims? A No, sir.

Q All right, sir. If you recall, what other types of trucks did you drive? A I drove a flatbed and pickup.

Q Now, sir, on what occasions to the best of your recollection would you drive these other trucks? A I drove a flatbed truck when I first started to work for Burnup and Sims, and then I drove the pickup when we had a small load to go out.

Q You say you drove a flatbed when you first started working for Burnup and Sims? When did you start driving a ready-mix truck? A Approximately 5 or 6 weeks after I started to work for Burnup and Sims.

Q All right, sir. When you started driving a ready-mix truck did you drive other types of trucks? A I had an occasion to drive the flatbed again, yes, sir.

Q All right. Any other types of trucks? A And I also drove the pickup.

Q How often did you drive those other trucks? With what frequency, if you can recall? A Whenever they needed another driver.

Q Whenever who needed another driver? A When-
[fol. 127] ever the dispatcher needed another driver for one of the flatbed trucks, or something.

* * * *

Q All right, sir. Were you employed, while you were employed by Burnup and Sims to the best of your recollection what were the average number of hours you worked per week? A Approximately 51 hours per week.

Q What was your rate of pay when you were hired by Burnup and Sims? A $1.25 an hour.

Q What was your rate of pay when your employment ended? A $1.35.

Q Did you receive time and a half for all over 40 hours work? A Yes, sir.

Q All right, sir. Were you among the group of employees who presented their wage demands to Burnup and Sims on September 21, 1961? A Yes, sir, I was.

Q All right, sir. To the best of your recollection please tell us what happened on the date of September 21, 1961, if anything? A Well, I arrived at work about 20 after 6:00 on the morning of the 21st. We had previously agreed upon that the evening before this, and we stood around, I stood around the clock for a few minutes and I went over to the warehouse, parked my car, got in my truck, drove my truck back over to the cement yard, batching plant, parked my truck, shut the key off, got out of the truck, walked back out in front of the dispatch office, and—well, it was about 5 or 10 minutes after 7:00.

Q Who else was there when you walked over to the
[fol. 128] dispatch office? A There was about, there was somewhere around 17 drivers, maybe a few more.

Q Please continue. A And we were there standing around and Doyle Tawney walked over to where we were at and he said, "what's going on here," and there were a couple of guys talking amongst themselves and when he asked that they shut up and he looked around and he said, "well, who's the spokesman for this group," and then Bob Davis said, "I am," and he says, "well," he says, "what do you want? What's going on here? What do you want," and Bob said, "well, we want a 5 cent an hour

raise," and then Doyle says, "well, I can," he says, "offer you 15 cents an hour raise but I can also cut you down to 40 hours a week," and Bob says, "well," he says, "I don't think," he says, "you can run the plant on 40 hours a week," and Doyle says, "well," he says, "I can bring you in," I think it was around 10 other drivers and start another shift, put on a second shift. Then Bob says, "all right, if you want to put on a second shift," he says, "go ahead," and some of the guys said, "yes, go ahead, we would enjoy for a while working 40 hours." I don't remember exactly who in the group said this but it was said, and then there were a couple other questions asked, I can't remember what they were, but Carl Moritz drove up in his Ranchero and Doyle says, "wait a minute," and he walked over to the Ranchero and stood over there for a few minutes, came back to the group and says, "Carl Moritz would like to see all of you over in the warehouse." So, some of them walked over and some got in other peoples' cars and drove over and some drove their own cars over to the warehouse. We all got into the warehouse and went inside and there was some drywall stacked [fol. 129] on the floor and some of them sat down on it and some were standing up, and Carl Moritz walked out of the office over in the warehouse and he walked up in front of a group and he says, "who's the spokesman," he says, "for this group," and Bob Davis says, "I am." Moritz says, "will you step forward," and Bob took a couple of steps out in front of the group and Carl asked, "who will stand up with you," and I said, "I will," and I took a couple of steps up aside of Bob and I believe Carl said that, "what is it that you are asking for," and Bob says, "we want, we are asking for 15 cents an hour raise," and Carl asked Bob what made him think that he should get a 15 cent an hour raise and I believe Bob said that the other Companies—

Q Where were you standing when he was talking to you? A Sir?

Q Where were you standing? A I was standing beside of Bob Davis.

Q Why were you standing beside Bob Davis? A Because Carl Moritz asked who would stand up with him.

Q All right. A And—let's see, I believe I was where Bob was answering his question, where the other Companies were paying more per hour than what the drivers at Burnup and Sims were receiving, and—

Q Please try to speakup, Mr. Harmon. A Would you read back what I last said there?

(Record read back)

Q Just as best you can recall. A And then Carl, he walked up and down in front of the group and he says, "I don't know," he says, "what the other Companies are paying but," he says, "I think you're, should receive," I think he said, I don't say the exact words that [fol. 130] he said there but the way that I understood it that he said was that he thought that we should be receiving more wage than what we were getting and that he didn't think that 15 cents an hour was an unfair wage to ask for and then he stopped and looked over the group a little bit and he said, "well, I'll tell you," he says, "those that want to go on working for the present wage," he says, "step over here," which was to his left as he was facing the group. "Those who don't," he says, "there's the door. We'll call it a voluntary quit," and so Bob Davis turned around and I turned around, Bob walked out and I walked out and the rest of the group followed us out the door to the outside.

Q Excuse me, Mr. Harmon, at this meeting in the warehouse what Management representatives were present as best you can recall? A Carl Moritz, Doyle Tawney, Walter Burnup, and—

* * * *

Q All right, tell us what happened when you left the warehouse, to the best of your recollection? A Well, when we went outside Bob Davis and Johnny McKnight had already left for the Union. We were standing in a group discussing what had taken place in the warehouse and Carl Moritz came out and he started asking a few more questions and he—telling us what all he had done for us and he said that he'd been, 2 weeks previous he'd been to West Palm Beach to see about a raise and that he tried to get a Christmas bonus for us, and a few

other things, I don't remember what they were, and then he asked some of the boys, pointed out specific ones, he says, "when you came here," he said, "I didn't ask you," [fol. 131] he says, "where you came from or whether you had any troubles, or anything." He says, "you left me two or three times." He said, "when you came back I gave you a job back without asking any questions," and then I asked him, I says, "well, Mr. Moritz, tell me," I says, "do I have to work here," I said, "4 or 5 years," I says, "like some of the other, older drivers here without looking forward to any raise of pay or any other benefits?" Then there was a few more questions asked and he turned around to me and he stomped his foot and pointed his finger and said, "now, back to your question." He said, "it's been Company policy here to pay the drivers," he says, "the top wage," he says, "once they know how to drive the truck and handle them after a certain length of time," and I think about this time that Johnny McKnight and Bob Davis drove up from the Union and Carl Moritz was looking at them driving up there and they got out of the car and walked over and then Carl says, "well," he says, "if you guys will go back to work," he says, "I'll forget this." He says, "there won't be no hard feelings over it," and then Bob says, he says, "well, what about," he says, "about the raise," and, "what are you going to do about that," and Carl Moritz says, "well, do I have to do anything," and Bob says, "you haven't offered us any compromise," and Carl says, "do I have to give a compromise," and Bob says, "yes, you do," and Carl says, "if you go back to work you will get your 15 cents an hour in 30 days."

* * * *

[fol. 132] Q All right, sir. Now, you signed a Union authorization card on September 29th, you testified? A Yes, sir.

Q All right, sir. Now, on this date, September 29th, 1961 what, if anything, happened to your employment status with Burnup and Sims? A My employment was terminated that day.

Q All right. Now, to the best of your recollection please tell us about the circumstances surrounding your

leaving the employment of Burnup and Sims. A Well, I arrived back off my last trip about 7:30 the night of the 29th, of September, and washed my truck out, parked it over at the warehouse; got in my car and drove back over to the time clock, which is right at the, almost at the dispatch office, and Doyle Tawney was standing in the door of the dispatch office and he says, "Joe," he says, "Mr. Moritz would like to see you in his office." So, I walked over and walked in the door and they was, there was two, I believe two offices separating the dispatch office from Mr. Moritz's office and at that time I didn't know which office was Mr. Moritz's so I stopped at each door and Mr. Tawney said, "it's the last one in the back." So, he went back with me and once I got in Mr. Moritz's office I said, "Mr. Moritz. I" I says, "I believe you wanted to see me." He says, "yes, Joe," he says, "I'm going to have to let you go." He says, "I have got to give this 15 cent an hour raise and I'm going to have to cutback in my help." He said, "you're one of the youngest ready-mix drivers," which I didn't reply nothing to that, and then I said, "Mr. Moritz," I says, "what's the chance," I says, "of going to work up at the Cocoa Plant when you open it," and his reply to me was he didn't believe they was going to open a Plant at Cocoa, and I said, [fol. 133] "well, what's my chances of getting called back to work here," and he looked at me and he says, "there's not any."

Q Not any what? A Not any chance of getting called back to work, but he just said there's not any in reply to my question and then he handed me my check and I said, "well," I said, "what about the layoff slip, or something here," I says, "for the employment office," and he said, "well, your check stub," he says, "will be sufficient," and I thanked him for the check and turned around and walked out.

* * * *

Q Mr. Harmon, now, sir, of your own personal knowledge on the date of September 29, 1961 was there any other Burnup and Sims employees employed on this date with less seniority than yourself, Robert Davis, and John McKnight, of your own personal knowledge? A Yes, sir.

Q There were. These employees of which you speak, were any of them truck drivers? A Yes, sir.

Q How many, approximately? A Approximately 8.

• • • •

CROSS EXAMINATION

Q (By Mr. Muller) Mr. Harmon, this, the people that you walked out on the 21st, were they all truck drivers? A No, sir, they weren't all truck drivers.

Q In the group that walked out how many were truck drivers, would you say? A Approximately—

[fol. 134] Q What you call truck drivers. A Approximately about 17 or 18.

Q 17 or 18? A Yes, somewhere around there.

Q I see, and out of those 17 or 18 truck drivers there were only 8 that were less senior than you, is that right? A That I know of.

• • • •

Q Mr. Harmon, since your layoff you've been very active in organizing for the Union, have you not? A I've been active, yes, sir.

Q In other words, you and Bob Davis are kind of pushing it a bit, aren't you? A No, sir, I mean, not me and Bob Davis.

Q Were you by yourself and Bob by himself? A I haven't had much to do with Union, too much.

• • • •

Q Have you been active since your layoff in passing out cards, trying to get fellows to sign cards? A Yes, sir.

Q Where do you go to get them to sign these cards?

TRIAL EXAMINER: All right. Now, where are you going?

MR. MULLER: If the Trial Examiner will allow me that question and one more I would rather if I may—

[fol. 135] TRIAL EXAMINER: All right.

A Well, I usually see the guys either at their house or meet them, run into them out on the street, or somewhere.

Q I see. Have you gotten any cards signed in the company of Robert Davis? A No, sir.

Q You have not, I see. All right. Have you solicited any cards from mechanics. A Guys that work over in the garage, yes.

Q Yes, sir, and you do know that Lyle Pate is one of the garage people, don't you? A Yes, sir.

Q Have you solicited a card from Lyle Pate? A I did.

Q Where? A At his home.

Q At his home? A Uh huh.

Q You do know, then, where he lives? He lives in a trailer, does he not? A No, I didn't know he lived in a trailer.

Q Where did you think he lives? A I thought he lived on Shannon Avenue.

Q Well, is that a trailer or not? I don't know, I'm asking you is it a trailer? A I thought it was just about a three room house, it didn't look like a trailer.

Q Is it in a trailer park? A No, it isn't in a trailer park.

• • • •

Q Tell me again what Carl Moritz said when Bob Davis told Moritz, "your competitors are paying better wages than you are?" A What Carl Moritz said when Bob Davis asked him that question?

[fol. 136] Q Yes, sir. A I don't remember the exact words. He said to him, he said to the best of my knowledge he said, let's see, I believe it was he said, "I don't think that 15 cents you're asking for is unfair."

Q Did he say anything else about that? A I can't remember right now.

Q So, Carl Moritz told you all that he thought 15 cents was not unfair? A That's right.

Q Did he tell you at that time he was going to try to get it for you? A I don't remember him saying that.

Q You do[illegible]? A Not at that time.

Q All right, but at any rate after Carl finished talking with you all, you all walked outside, right, in a group? A Yes, sir, there was a whole group went outside.

Q Okay, and where did Carl Moritz and Doyle Tawney stay, or where did they go? What did they do? A I could not tell you because I wasn't paying any attention to them.

Q They didn't come out among the group again at that time? A They come out about 5 or 10 minutes later.

Q Oh, about 5 or 10 minutes later they came out and then Mr. Moritz told you all he had been down to West Palm Beach trying to get you a raise, is that right? A I believe so.

Q All right. A At that time.

MR. MORAN: Mr. Harmon, I couldn't—you keep answering something else and I can't hear you. What did you say?

THE WITNESS: I said I believe so.

[fol. 137] MR. MORAN: I thought you said something else after that.

Q What did he specifically say about him going down to West Palm Beach, if you can recall? A The best I can recall, he said he'd been down there two weeks previous trying to get us a raise, negotiate a raise and try to get us a bonus for Christmas.

* * * *

Q All right. So, about that time after possibly some more questions Davis and McKnight come back, is that right, from the Union Hall, you say? A Somewhere around there, yes, sir.

Q So—all right. So, they come back. What's the conversation after that between Moritz and Davis? A Well, Moritz had asked us to go back to work and everything would be forgotten.

Q Yes. A And then Davis said, "what about our 15 cent an hour raise," and Moritz said, "do I have to give you 15 cents an hour raise," or, "do I have to compromise," I believe it was, something to that effect, and Davis said, "well," he said, "you haven't offered us no compromise," and then after them few questions I believe that Moritz—

TRIAL EXAMINER: Keep your voice up.

A I believe that Moritz said, "you will have your 15 cent an hour within 30 days," and just turned around and walked off.

Q Then, it's your recollection today that Moritz made the definite promise to give you all 15 cents? A Yes, sir.

[fol. 138] Q It is not your recollection that he said he would see what he could do about it, or see about it? A No, sir, I believe if he had said something like that I believe the men wouldn't have gone back to work, is my belief.

Q I show you a statement dated 11 October 1961 purporting to bear your signature, Joseph Henry Harmon, and ask you to look at the signature and see whether or not that is the statement you made. A I guess so, that looks like my signature.

Q Do you recall giving that statement? A Yes, sir, I don't recall what's in it but I recall giving it.

Q Do you recall making in this statement the statement that Bob Davis and John McKnight came back about this time and Carl said he didn't think that we were asking too much and that he'd been trying to get us a raise and that he'd been fighting for a raise for quite a while and that he would see about getting up a 15 cent raise in 30 days if everyone would go back to work? Do you remember making that statement? A I could, I don't remember saying it like that but I could have made that, I don't remember.

Q You did read this before you signed it, though? A Oh, yes.

* * * *

Q I see, okay. You said you got two checks that day, the first check you described as being your ordinary paycheck that was due that day, right? A Yes, sir.

Q What was the second check that you got, what did [fol. 139] that represent? A That—well, I don't know exactly what it did represent.

Q Well, didn't Carl Moritz tell you that he was giving you some extra money until you could get yourself lo-

cated? A He said he was giving me some extra money until I could get a—well, help out, he said, I think he said.

Q To help out? A I don't know exactly now that you mention it, he did say something about it, I don't remember what it was.

Q Okay. Then, that's what the check represented? A Yes.

Q Then we both know what it represented then, don't we? A Yes, sir.

Q Good. Oh, you're the man, aren't you, that helped Doyle set some dynamite in one of those trucks to blast out concrete, didn't you? A Yes, sir, I did.

Q How long after that was it you were laid off? A I don't remember exactly, a couple, three days, something like that.

Q And what did this blasting involve? A You mean involve?

Q How big a job was it? A It was quite a job, I mean, a lot of drilling there and placing of the charges, and—

Q I see, and where was this done? A It's in—well, it's next to the mechanics' garage.

Q That's right behind the dispatcher's office? A No, sir, that's over behind the, over on the other side of the block yard.

Q Over on the other side of the block yard? A Yes, sir.

Q What did that entail, setting the fuses on it, the [fol. 140] caps, or whatever you call it? A Placing the charge, priming it and setting the charge off.

Q This was something that you saw Doyle doing and you volunteered to help him out a little bit on it, wasn't it? A Well, I volunteered my services, yes, sir.

Q Okay, fine. I show you what I have marked as Respondent's Exhibit 2 for identification purporting to be a carbon copy of a letter dated November 8, 1961, addressed to Joseph Harmon. I ask you whether or not you have ever seen the original from which this carbon was made? A I believe that's the way the other letter read.

Q You received a copy of what you think, or you re-

ceived the original of what you think this copy was made? A Yes, sir.

Q All right. Following receipt of Respondent's Exhibit 2 did you ever contact the Company in any manner, either telephone or write to Moritz or Tawney concerning it? A No, sir.

Q Not at all, all right.

MOTION TO ADMIT EXHIBITS

MR. MULLER: We will move to admit Respondent's Exhibit 2 for identification as Respondent's Exhibit 2.

MR. KRUZICH: No objection.

TRIAL EXAMINER: Received without objection.

[fol. 141] (Thereupon, the document above referred to was received in evidence as Respondent's Exhibit No. 2.)

MR. MULLER: I will move to admit Respondent's Exhibit 3, the affidavit of Joseph Harmon, dated October 11th for, limited strictly to its value, impeachment value.

* * * *

TRIAL EXAMINER: The objection is overruled. The document is received.

(Thereupon, the document above referred to was received in evidence as Respondent's Exhibit No. 3.)

* * * *

REDIRECT EXAMINATION

Q (By Mr. Kruzich) . . .

* * * *

Q All right. I note in your affidavit which we gave to the Board, Respondent's Exhibit 3, that you stated here, sir, "Bob Davis and John McKnight came back about [fol. 142] this time and Carl said he didn't think that we were asking too much and that he had been trying to get us a raise and that he had been fighting for a raise for quite a while and that he would see about getting us a 15 cent raise in 30 days if everyone would go back to work." Search your memory at this time. Did Carl Mor-

itz ever say to the group they would have their raise in 30 days, as best you recall? A At this time the best I recall them's the words he said.

Q That he would give them a raise? A That he would; I say, that he would.

Q This statement, here, given to the Board, Respondent's Exhibit 3, read this first paragraph, please.

TRIAL EXAMINER: Read it to yourself, you don't need to read it out loud.

Q You read that first paragraph? A Yes, sir.

Q Now, your testimony is that Mr. Carl Moritz said that he would give the men a raise in 30 days. You have just testified to that previously. A Yes, I just testified to that.

Q All right. Are these your words in this affidavit? A Yes, sir, I guess—

* * * *

TRIAL EXAMINER: I don't know, but I would like to know why the witness has given me one answer and then given General Counsel another.

[fol. 143] MR. MORAN: First, of all, I don't think he's given you two different answers, Mr. Trial Examiner. I think he said—

TRIAL EXAMINER: I asked the witness if that statement was correct and he told me it was.

THE WITNESS: That is just what I answered him.

TRIAL EXAMINER: Are you saying now that Mr. Moritz on this occasion made two different statements? He said first "I'll see about getting you a raise in 30 days," and second, "I'll get you a raise in 30 days?" You know there is a difference, don't you?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Did he make both statements?

THE WITNESS: No, sir, he didn't make both statements.

TRIAL EXAMINER: Which one did he make?

THE WITNESS: I imagine he, the affidavit would be more to the fact because it was more recent than what this last one is.

[fol. 144] TRIAL EXAMINER: You mean now you don't remember what he said?

THE WITNESS: To the best of my knowledge I mean I remember what he said.

TRIAL EXAMINER: All right, to the best of your knowledge what did he say on this subject matter?

THE WITNESS: After reading the affidavit I would have to say he went to see about a raise.

TRIAL EXAMINER: Is that the way you remember it?

THE WITNESS: As of now, yes.

• • • •

Q All right. On cross examination counsel for Respondent asked you whether you solicited a card from Lyle Pate. Now, do you understand what the word solicit means? What does it mean to you? A It means offered, don't it? Offer a card to Lyle Pate?

Q Well, tell us about this card incident, how you came to giving a card or doing something with this card with [fol. 145] Lyle Pate? What happened, how did this come about? A Well, Lyle Pate had stopped me.

Q Where? A A couple of days before that, driving down Shannon Drive, and he asked me to get him a Union card so he could sign it.

Q What was he doing, Mr. Pate? A He was walking, I think he might have been going to the store, or something. I couldn't tell you exactly what he was doing.

Q All right. A He was just walking up the road.

Q What time was this? A This was about, is was about 6:00 o'clock in the afternoon or evening?

Q All right. Continue, tell us what happened. A And I told him I'd see about getting him a Union card.

Q Did he ask you for this Union card? A Yes, sir, he asked me for the Union card.

Q Tell us what was said, Mr. Harmon, as best you can recall. What did he say and what did you say? A He asked me to get him a Union card so he could sign a Union card.

Q All right. A And I told him I'll see what I can do towards getting you a Union card and then he asked me when did I think I'd have one and I said, "oh, maybe the next 3, maybe 4 days," and he says, "okay." Then, I just drove on off. Then, a couple of days later I was out

to, in the meantime I had seen Johnny McKnight and picked up the book of Union cards.

Q Is that how you came to present a card to Mr. Pate, at his request? A Yes, sir, at his request.

Q All right. Now, you went to his house. A First I went to Buddy Wagner's house.

Q All right. A And—that's Ralph Wagner, and—[fol. 146] Q What time was this? A That was about 5:30 in the evening.

Q All right. A And I was talking to Ralph Wagner about playing cards since I heard there was supposed to be a card game that night, and he says, "no, not as I know of," and I asked him where does this Lyle Pate live, he says he lives next door and I says, "well, I better go over and see if he's home," and he says, "well, he may be home now, he usually don't get in 'til 6:00 o'clock or a little later." So, we stood around there and talked, it was up pretty close to 6:00. I went over, went outside and got in my car, drove over to Lyle's house and there was some girl standing in the yard and I asked her was Lyle home and she said yes. I said, "will you tell him to come here a minute," and she hollered for Lyle and he came outside and I said, "Lyle, I have the Union card you wanted me to get for you." So, he came out and he started to fill out the Union card and I don't know whether he just doesn't print good or he was nervous, or what, about filling the card out, but I couldn't understand what he was writing in it. So, I told him, I said, "well, here, I'll fill this card out and you can sign your name to it," and I filled the card out and he signed his name to it then he asked me, he said, "well, when's the next Union meeting to be," and I says, "I don't know, but you can ask Ralph or one of the guys that works up there, they will notify you when the next meeting will be," and I turned around and drove off and drove back to the house and eat supper.

Q Now, when you went to see Mr. Pate did you see him at a house or a trailer? A A house.

Q Do you know the difference between a house and a trailer? A Yes. I do.

[fol. 147] Q This was a house you went to? A Yes, sir.

Q What street was this on? A It's on Shannon Drive.

Q Okay. Was there anyone with you when you went to Mr. Pate's house? A No, sir, I was by myself when I went.

Q By yourself? A Yes, sir.

Q This letter was sent to you, this is a carbon of the original sent to you, is that correct? A Yes, sir, I believe it is.

Q All right. Now, when you first received that letter was this the first time that it was brought to your attention? A No, sir.

Q Brought to your attention, I mean that it was being alleged that you had made or condoned threats to damage property of the Company? A No, sir.

Q Did you ever at any time make a threat to damage Company property? A No, sir.

Q Were you ever in the presence of anyone who did it? A No, sir.

Q Now, when you received this letter did you reply to it? A No, sir, I didn't.

Q Tell us why you didn't. A Because I had already signed an affidavit to the fact that I hadn't condoned or made any threats to the Company and presented it to the Government attorney and he was handling the facts on that case and investigating it.

Q When was this affidavit taken of yours? Was this before you received this letter or after? A Yes, sir, it was before I received this letter.

Q Before, all right. Your testimony is that before you received this letter you were already aware of the fact— A Yes, sir.

[fol. 148] Q That someone had stated that you had threatened to destroy Company property, is that correct? A That's correct, sir.

Q Or condoned it? Who told you of this fact? A The Government attorney.

Q All right. Have you to this date learned who signed the affidavit or what-have-you accusing you of damaging Company property? A Yes, sir, I have.

Q Or condoning it? A Yes, sir.
Q Who was this? A Lyle Pate.
Q All right. Mr. Harmon, you have mentioned previously that you went to Mr. Pate's home to give him a Union card. Had you ever gone to Lyle Pate's home on any other occasion? A No, sir.
Q Before or after this? A No, sir.
Q Was this the only occasion? A This was the only occasion, sir.
Q Now, when you saw Mr. Pate did you say anything about if the Union didn't win with Burnup and Sims you would blow up the gravel stacks? A No, sir.
Q Did you say to Mr. Pate if the Union didn't win that you would do any destructive act at Burnup and Sims? A No, sir.
Q All right. Did you discuss the coming election with Mr. Pate? A No, sir.
Q You didn't? A No, sir.

* * * *

[fol. 149]

RECROSS EXAMINATION

Q (By Mr. Muller) You located Pate's house through Buddy Wagner, is that right? A Ralph Wagner.
Q Ralph Wagner. What was that, his parents' home, or do you know whether it was his parents' home? A I don't know for sure now whether that's his parents' home or not.
Q Yes. A I couldn't say.
Q Okay. Now, when was this that you talked to Pate at this house? A That was on October the 11th.
Q October the 11th? A That's when he signed his card.
Q October the 11th. What time was this, day or night? A It was daytime yet.
Q What, morning or afternoon or what? A Afternoon, it was P.M.

* * * *

JOHN PHILIP McKNIGHT, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Kruzich) Please state your name and address for the record. A John Philip McKnight, Frank's Trailer Park, Melbourne.

Q Were you ever employed by Burnup and Sims, sir? A Yes, sir.

[fol. 150] Q When? A The last week in June to September the 29th on the first occasion. On the second one, the last part of October or first part of November to November the 29th.

Q All right, sir. What was your job upon the first occasion? A A dump truck driver.

Q What was your job upon the second occasion? A When I first started?

Q Yes. A A dump truck driver.

Q What was your job when it ended? A Ready-mix driver.

Q All right, sir. While you were employed by Burnup and Sims upon the first occasion to the best of your recollection, sir, what were the average number of hours you worked per week? A Approximately 61 to 62.

Q This is on the first occasion? A Yes, sir.

Q All right. What about on the second occasion, what was the average number of hours you worked as best you can remember? A Approximately 52.

Q They were less on the second occasion? A Yes, sir.

Q All right. Upon the first occasion what was your rate of pay when you first hired? A $1.25 per hour.

Q All right. When you left the employment of Burnup and Sims upon your first occasion what was your rate of pay at that time? A $1.30 per hour.

Q When you went back to work for Burnup and Sims upon the second occasion what was your rate of pay? A $1.35.

Q And when you again left their employment? A $1.35 per hour.

Q Upon both of these occasions did you receive time and a half for all over 40 hours work? A Yes, sir.

Q Mr. McKnight, were you among the group of [fol. 151] employees that presented a wage demand on Burnup and Sims on this date of September 21, 1961? A Yes, sir.

Q Please tell us as best you remember what happened upon this occasion, if anything? A At 6:00 o'clock that morning I came to work about five after 7:00, something like that, and Bob Davis and Sherman Franks and a few other drivers were standing in front of the dispatch office and I went over to them and we talked around, said a few things, and roughly 7:00 to 7:10 Carl, I mean, Doyle Tawney, he took and drove up, he came over to the group and he asked them what was going on. Nobody said anything and he asked who the spokesman for the group was and then Bob Davis stepped forward and said he was the spokesman. He asked him what he wanted and he said they would like to have a 15 cent an hour wage increase. He said, "well," he said, "first I see there is some raises that I will have to cancel," and one of the men stepped forward, I believe it was Bill Allewine, and said, "why do you have to cancel them?" He never did answer. Then, he said, "If I give you the 15 cents an hour I will cut you back to 40 hours a week." Then, Bob said, "well, all right, if you can. I don't think you can work this 40 hours a week." He said, "this type of business you can't keep a schedule like that." He said he could do it, he'd hire 10 extra men and stagger the work shifts. So, there was a few other questions raised. He left the group a moment and went inside. I don't know what he did but a few minutes later Carl Moritz drove up. When Carl drove up he came out to the, Doyle walked out to the Ranchero, he leaned over and said—I don't know what he said but he came back over to the car, I mean, to the group and told us that Carl wanted to talk to us in the warehouse. So, we said all right. In a few minutes the rest of us got in our cars and went [fol. 152] over to the warehouse. Some of them walked, I guess, I don't know. I drove. When we got to the warehouse we took a position in the warehouse approximately

to the center to the south side. Carl Moritz and Doyle came out to the office and stood in front of the group about 15 feet away from us, I guess, facing the group and Carl Moritz asked, he said, "what, who's the spokesman for this group?" Davis stepped forward and said, he asked for the spokesman to step forward and Davis stepped forward and said he'd be the spokesman for the group. He said, "is there anybody else that's going to stand up with him?" Joe Harmon stepped forward and said that he would stand up with him. Then, he asked, he said, "all right, what do you men want?" Davis told him, said we'd like to have a 15 cent an hour raise and he said, "oh, and why do you think you should get this raise?" He said, "because the concrete companies in that area were paying more money than what Burnup and Sims was," and then he said something about the Trust Plan, I don't know exactly what he said about that. I think—well, I wouldn't say because I don't know exactly what he said. Then, Carl started talking about the benefits that he had acquired from the Company, such as paid vacation, they pay a percentage of the insurance, things like that, and he kept on talking in that nature for a while. I can't remember exactly what he said. Then, he said the men that want to stay working for the present rate step over here, and motioned with his left hand: the ones that don't want to continue with this thing you will walk out that door in a volutary quit, and nobody said anything and in a few seconds Davis and Joe Harmon turned and walked out the front door and the rest of us followed him. Then, when we got on the outside—

[fol. 153] Q Excuse me, Mr. McKnight. A Yes, sir.

Q You stated that Carl Moritz and Doyle Tawney were standing away from the group about 15 feet, is that correct? A Yes, sir.

Q Was there anyone else standing there? A Yes, sir, there was.

Q Who was it? A Walter Burnup came out, he wasn't there at the beginning but he came out a little bit later on. Then, Dick Burney, and I believe—

* * * *

Q Going back to the employees that were in the warehouse, what, if anything, did you do after you left the warehouse? A We walked out the front and someone mentioned something about going to the Union and see what kind of protection we could have, if any. So, me and Bob Davis got in our car and drove to the Teamsters' Hall in Eau Gallie. When we got there there was nobody there. We seen a list of officials on the door. We tried to contact them, couldn't get a hold of anybody. So, we went back to Burnup and Sims. When we got there Carl was standing in front of the group talking to us and as we drove up he watched us drive up and we drove up, oh, maybe 35 feet from where he was standing. When we got there he was telling the men that they was keeping their trucks clean, and stuff, and they was doing a good job, and that again he was telling about the benefits that he had acquired and that he had been down to West Palm Beach earlier, I don't remember exactly what day he said or if he even said any, but he had said he'd been down to West Palm Beach trying to negotiate for raises, [fol. 154] and stuff, for the men and trying to improve working conditions, and he said once again his trucks were sitting still, he'd have to have his trucks rolling and that there was the trucks if we wanted to get in them we could get in them and start driving and there would be no hard feeling, and Davis said, he said, "I don't think you're giving us anything, no compromise," and he said, "do I have to," and Davis told him, "yes." He got a little bit disgusted, turned around and started to walk away. As he was walking away he turned back around once again and he said, "you will have your raise in 30 days," and he walked on off and nothing else was said.

Q Did the men go back to work? A Yes, sir.

Q All right. Upon this date, September 21, 1961, did you have any further conversations with Carl Moritz concerning this walkout? A Yes, sir, I did.

Q All right, where? A In the warehouse office.

Q All right, sir, about what time, approximately, did this take place? A 6:00 to 6:30.

Q In the evening? A In the evening.

MR. MULLER: What was the date on this, I'm sorry?

MR. KRUZICH: Same day.

MR. MULLER: Oh.

Q Who was present? A Carl Moritz and myself. [fol. 155] Q Now, please tell us what was said as best you can recall. A I had brought the sand tickets down from e Eau Gallie Plant and turned them in to Carl Morit.. He asked me, said, "Johnny, would you have gone through with what you started this morning?" I asked him if he meant the walkout and he said yes. I said, "yes, my father told me once I made my play to follow it through and I had made my play." He turned around and acted as if I wasn't even there so I left, punched and went home.

Q Did you ever attend any Union meetings while you were an employee of Burnup and Sims? A Yes, sir, I did.

Q What day? A September the 28th.

Q Did you pass out cards? A Yes, sir, they did.

Q No, you? A September the 28th?

Q No, did you pass out Union cards at any time while you were employed at Burnup and Sims? A Yes, sir.

Q Did you, yourself, sign one? A Yes, sir.

Q Now, you stated you attended a Union meeting on September 28, 1961, correct? A Yes, sir.

Q Now, the following day what happened, if anything, regarding your employment status with Burnup and Sims? A I was fired.

Q To the best of your recollection please tell us the events surrounding your leaving the employment of Burnup and Sims on September 28, 1961. A I had gone out on a delivery with Bob Davis on his truck to learn how to operate a truck. On the way back Andy Minor called up on the two-way radio and said they wanted to see us in the office. He didn't say who it was at that time. When we got back in I seen Doyle Tawney standing outside and I asked him, "you wanted to see me," because I didn't know whether they was talking about Doyle, Carl, or [fol. 156] who in the office and he said, "Carl wants to see you in the warehouse."

Q When he said you, who was that? A Me, me and Davis in the warehouse office. So, Davis took his truck over, I went out back, got in my truck, went on over, walked in the warehouse. Carl said, handed us our checks and said, "I'm going to have to lay you two boys off." Davis asked him why. He said that due to the 15 cent raise that we had asked for he had to make a cutback in his forces, in his working force. Davis said, "well, according to Company regulations I believe that there is men here with less seniority, and according to Company regulations we would not be the first ones laid off. So, therefore, I think this is a personal matter." Carl said no, that it wasn't and that—he didn't say nothing else, he just said no, it wasn't. Davis asked him can we have this in writing to show to the Unemployment Office. He said no, that he didn't feel that it was necessary, and so Davis turned around and started walking out and I asked him, I said, "can we—then, you won't give it to us in writing," and he said, "yes, I see no reason why not. I will give it to you Monday morning."

* * * *

Q All right. Now, you testified that Robert Davis told Mr. Moritz this time that the layoff was not in accordance with seniority, is that correct? A Yes, sir.

Q All right. Was it in accordance with seniority? A No, sir.

Q Explain. A Well, there were several truck drivers there and a couple warehouse men that had less seniority than either me or Davis or Harmon or any of us. [fol. 157] Q All right, sir. When was the next time you returned to Burnup and Sims? A The following Monday morning.

Q Did you have any conversations with Carl Moritz? A I don't recall whether I had any—

Q Were you in a group that had a conversation with Carl Moritz? A Yes.

Q All right, who was present? A Me, Davis, Harmon, Carl, Lillian Padgett, Fred Deyeager, Yvonne Burney and Carl Moritz.

Q All right, all these people were present when this conversation took place? A Yes, sir, they work in the office.

Q These are office employees? A Yes, sir.

Q Please tell us what was said, if anything, at this time. A We went in there and asked Carl Moritz for our layoffs slips that he said he'd give us in writing. He said that our checks were substantial.

Q Was anything else said that you can recall? A He said that if we got a job that he would telephone the person and give us a recommendation. No, first he said that he would give us a good recommendation and I asked him for it, for it in writing and he said to have them call up.

Q All right. Now, would you please tell us the circumstances surrounding your rehire by Burnup and Sims as best you can recall? A I was working for Melhaun at Radiation, building a building down there, and Doyle Tawney came down there on a Friday at noon and asked me if I wanted to come back to work for them, they had a job opening in the warehouse. I told them that I would go back to work for them and I asked, I said, "well, what about this unfair labor practice we have against you," and he said, "that remains to be seen, we'll have to find out about that when the Judges says so," and he said, [fol. 158] "report in Monday morning at 7:00 o'clock," and I told, asked Melhaun if it was all right and he said that it was because business was getting kind of slack now, that he didn't have much for us to do. So, I went to work the following Monday morning.

• • • •

CROSS EXAMINATION

Q (By Mr. Muller) . . .

• • • •

Q Does the Company to your knowledge publish any written working rules? A Not to my knowledge, sir.

Q Is there any seniority list posted at the Company? A Not to my knowledge.

Q Has anything ever been said at this Company that strict seniority is going to be followed in layoffs and recalls by anyone? A Not to my knowledge, sir.

• • • •

Q Well, how many fellows were newer than you, drivers? A 5.

Q About 5 were newer than you? A Yes, sir.

• • • •

[fol. 159] SHERMAN EARL FRANKS, a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Moran) Mr. Franks, would you tell us for the record your full name and address? A My name is Sherman Earl Franks.

Q Keep your voice up, we all want to hear you. And your address, please? A 702 West Westover, Eau Gallie.

Q By whom are you employed, Mr. Franks? A Burnup and Sims.

Q And your job there? A Truck driver.

Q What department? A Ready-mix.

Q How long have you been so employed? A About 2, almost 3 years.

• • • •

Q Mr. Franks, I direct your attention to September 21, 1961. Were you among a group of employees who had a conference with Mr. Moritz concerning a 15 cent wage increase? A Yes, sir.

Q Who was spokesman for the—was that with a group of employees or was it by yourself that you had a conference with Mr. Moritz on September 21st? A It was a group of men, that's when, we was all in a group, I guess.

Q Who was the spokesman for that group? A Davis.

Q Was anyone else standing up with him when they

[fol. 160] talked with Mr. Moritz in the warehouse? A All of us were standing there.

* * * *

Q Did you subsequent to this time, or after this time did you have another meeting with Mr. Moritz about the raise, you, yourself? A Yes, I think—yes, he called me in the office and told me I was going to get a raise.

Q As best you can recall when did he call you into the office, about how long after your walkout? A Let's see, now, I think it was Friday, I think it was Friday, I'm not sure but I think it was Friday.

Q You mean the next day, September 21st, to which you testified you met with Mr. Moritz in a group? It was a Thursday. Was it the following day or a week from that Friday? A I think it was, I think it was that Friday.

Q The next day? A Yes, I think it was. I'm not sure but I think it was. I'm not real positive.

* * * *

Q Well, when, what did Mr. Moritz say? First of all, who was present at this conference? A Well, there was Mr. Moritz and Mr. Burnup and myself.

Q Mr. Moritz, Mr. Burnup and yourself.

MR. MULLER: Which Mr. Burnup was this?

[fol. 161] MR. MORAN: Counsel, it's my witness, we'll straighten everything out.

MR. MULLER: All right.

Q Which Mr. Burnup was present at the conference? A It was Walter Burnup's Dad, it was all I know is Mr. Burnup.

Q I'm sorry, I didn't hear your— A It was the owner.

Q It was the owner? A Yes.

Q Do you have another Mr. Burnup at the Plant? A His son works there, Walt.

Q His son works there. Was he at the conference? A No.

Q You will have to speak up. A No, he wasn't there.

Q Well, what did you say to Mr. Moritz or Mr. Burnup and what did they say to you at this conference, if

anything? A Well, they told me I was going to get a 15 cent raise on the week, I mean, on my check that week, and—

Q Who said that to you? A Carl.

Q Mr. Moritz? A Yes.

Q Did Mr. Burnup say anything? A Yes, he said that—let's see, now, get everything straight. I don't—well, he did say, he said that they had, I think he said they had 5 guys to replace us that morning at the Plant if we went ahead and walked out.

Q He had 5 men to replace you if you walked out that morning? A Yes.

Q Did he say what morning he was referring to? A The Friday morning we walked out, I guess; I mean, it must have been the Friday morning when we walked out. [fol. 162] Q All right, sir. Did he say anything else that you can recall? Mr. Burnup said that? A Yes.

Q All right, sir. Was there any further conversation at this meeting that you can recall? A Well, I think Carl said he wouldn't stand in front of a group again, that he didn't do that right, I mean, we didn't go at it the right way to get a raise, or something like that.

Q Well, was that what he said, or something like that? A He said he wouldn't stand in front of a group again and that we didn't do, go about getting the raise right, in the right way.

Q Did he tell you what was the right way to get a raise? A No.

* * * *

Q Did anyone at all mention your length of service with the Company that you can recall? A Yes, he said with the older men they was going to get a raise, and that's all I know about that.

Q Did he tell you what he meant by older men? A Men that had been there.

Q How much service did you have to have, did he ever explain that to you, can you recall? A Well, no.

Q Do you recall him mentioning anything about those with more than a year or more than two years would get so much money? A I think he said something about

two years, if he had been there two years would get a 15 cent raise.

Q Over two years would get a 15 cent raise, who said that? A Carl was talking then, I think.

[fol. 163] Q Now, I think you said before—is that about all you can recall of that meeting, conversation? A That's all I can remember.

Q Did you subsequently get the raise? A Yes, we got a raise.

Q Was it in your paycheck? A Yes.

Q I believe you already testified you worked for the Company about 2, 2½ years, something around there? A Between 2½, 3 years.

Q All right, sir, and during your period of employment with Burnup and Sims have there been any other layoffs? A Yes, they've had a couple layoffs, I mean, when business gets slack they would lay some of them off.

Q Of your own personal knowledge, Mr. Franks, with relationship to seniority which men were laid off? A The men that just, I mean, the younger men would be the first ones laid off.

Q In other words, the layoffs in prior instances have always been in accordance with seniority?

MR. MULLER: I object to that conclusion. I don't think it's borne out. The witness gave a general answer; just younger men. Counsel is rephrasing that in a conclusionary question, in accordance with seniority. That isn't what the witness has testified.

TRIAL EXAMINER: Let me have the question.

(Record read back).

[fol. 164] TRIAL EXAMINER: He can answer it.

Q You may answer, were the prior layoffs in accordance with seniority? A Yes.

* * * *

CROSS EXAMINATION

Q (By Mr. Muller) . . .

* * * *

Q Okay. Now, when you said that in the past layoffs the layoffs have been in accordance with seniority,

did you mean that the absolute lowest men were the first laid off or did you mean rather that out of generally the younger men the layoffs was taken? A Well, they usually take the ones, the last ones come there and lay them off first.

Q You say they usually do? A Yes, as far as I—I mean, that's all I know, that's as much as I can say about that.

* * * *

CARL MORITZ, a witness called by and on behalf of Respondent, being first duly sworn, was examined and testified as follows:

[fol. 165] DIRECT EXAMINATION

Q (By Mr. Muller) Would you state your name and spell your last name, please? A Carl Moritz, M-O-R-I-T-Z.

Q And what is your business or occupation? A Manager of Burnup and Sims.

Q Where is that located? A Melbourne, Florida.

Q What is the business of that Company? A Ready-mix concrete, block, and related materials.

Q That is carried on in Melbourne, is that right? A It is, sir.

Q Does Burnup and Sims have any other operations outside of Melbourne? A We have a truss plant, I mean, a concrete plant at Eau Gallie.

Q Burnup and Sims do anything else other than your ready-mix, block and truss? A There is a conduit department in West Palm Beach.

Q West Palm Beach is your home office? A Home office, yes, sir.

Q Who are your direct supervisors, if any? A Mr. Burnup, the President; Mr. Sims, the Vice President; Mr. Graham, the General Manager.

MR. MORAN: Who is the General Manager? I didn't—

MR. MULLER: Graham.

Q Okay, what position does Doyle Tawney occupy in your setup? A He is my superintendent.

Q All right. What position does Walter Burnup Jr., [fol. 166] occupy in your organization? A Walter is, at the moment, collection.

• • • •

Q Do you recall the meeting with your men inside the warehouse on September 21, 1961? A I do.

Q Would you tell us, to the best of your recollection, what occurred? A On the morning of September the 21st I drove up to the office and there was a group of men standing against the block with Doyle Tawney and as I drove up Mr. Tawney came to me and I asked him what was up and he told me that the men refused to go back to work unless I gave them a raise.

Q What did you do then? A I told Mr. Tawney to bring these men to my warehouse so that I could talk to them there.

• • • •

Q What was said by you and what was said by the group and if you can designate who said what in the group. A I approached the men in this fashion, I said, "I understand you're having difficulties and that you're here for a raise," and, "what is it that you want," and nobody spoke up. I says, "is there anyone that will speak up for all of you," and Mr. Davis spoke up and advised me that they were there for a raise. I asked them how much. He told me 15 cents an hour.

Q What did you say, then, if anything? A I told them that I couldn't give a raise right there, and then, [fol. 167] and that this was an unusual way for men to approach Management for a raise.

Q This was inside the warehouse, is that right? A In the warehouse.

Q All right. A And that the magnitude of the raise was beyond my control and that they would have to give me some time and that in needing this time I would ask them to go back to work.

• • • •

Q All right. What happened after, as you testified, the men nodded their heads that they couldn't go back to work without a raise? A I asked the boys to reconsider and that they should reconsider in the manner of who wanted

to go back to work and who didn't and after they had made up their minds to that extent that we would be able to proceed.

Q All right, tell us what happened? A Well, I was again confronted with, "are you going to give us this raise or not," and I told them that as long as they felt that way that they wanted a raise, I said, that these things usually come about from better cooperation, not by means of loafing. I think I pointed out at the time that cooperation was the biggest means towards success in respect to obtaining a raise and that loafing, and I think I pointed out to Bob Davis at that time that he was one of the loafers, and that that, first of all, had to be taken care of.

• • • •

[fol. 168] Q All right. Thereafter, did you talk to this group again? A Yes, I did.

Q Tell us the circumstances. A Well, when the boys walked out I just didn't feel that they meant to do so, and —in the manner that they did, and realizing possibly the difficulties that they might subject themselves to family-wise, and so forth, and so I went back out there and I asked them to reconsider this act of walking out.

Q What did you say to them? A We discussed in general—

Q Not in general, if you can, specifically what did you say to them and what did, what was answered and who answered what, the best you can recall? A I asked them, "you won't go back to work?" No, they wouldn't go back to work.

Q Who is "they"? Who said that, if you can recall? A I asked the group and they shook their heads.

Q All right, go ahead. A And then Mr. Davis came forth and he says, "no, not unless we get a 15 cent an hour increase."

Q All right. A And I said, "on what grounds really do you expect this 15 cent increase," and Mr. Davis told me that my competitors were paying that much money to their truck drivers. I told Mr. Davis I didn't know how much my competitors were paying their truck drivers but that if this was so that I would say that they were not unreasonable in their demands, and that I would not be

able to promise them a raise at that time but that I would most certainly try my best to do whatever I could to get them what they were asking for.

Q Did you place any time limit on how long you would take to get them— A The men asked me how long it [fol. 169] would take and I told them before I left them that I would try to obtain that raise for them within the month.

Q Now, was that, those were your exact words, best you can recall, is that right? A As well as I can recall those were my words, sir.

Q What happened, then, if anything? A I went back to my warehouse, to my office in the warehouse and 5 or 10 minutes later the men went back to work.

Q Okay. I show you what I have marked as Respondent's Exhibit 4 for identification purporting to be a letter from Russell Burnup, dated September 13th, and ask if you have ever seen it before? A Yes, sir.

* * * *

Q Did you recognize this letter? A Yes.

Q On or about what day did you see it? A I'd say I saw it about October the 14th.

Q Tell us the circumstances surrounding the issue of this letter, if you know. A Burnup and Sims has meetings quarterly at the main office to which the departmental heads and their various branches are invited for a general discussion of the Company's problems and future anticipations. At this meeting I corraled Mr. Burnup and Mr. Sims and told them that I had found my men to be more cooperative, that they had all done a fair job, that my equipment was beginning to show that, that the appearance of the yard was beginning to show it, the yard, the warehouse was an example in the field, and I asked Mr. Burnup and Mr. Sims for a general increase of a nickle per hour for every employee in the yard.

Q Did they give you an answer at that time? A They told me that they would consider it, that they thought [fol. 170] it was highly recommendable and I would hear from them shortly in respects to same.

Q All right. Did you ever hear from them? A Yes, I did, sir.

Q In what manner? A In the form of a letter.
Q And that letter is Respondent's— A That was their response.
MR. MORAN: Could I have a date when that meeting took place when he asked for a nickel—
Q When was that meeting? A September the 12th.
MR. MORAN: 1961?
THE WITNESS: 1961.
MR. MORAN: Thank you.

MOTION TO ADMIT EXHIBIT

MR. MULLER: We will move to admit Respondent's Exhibit 4 for identification as Respondent's Exhibit 4.
MR. MORAN: We would like to know the purpose, Mr. Trial Examiner, why this letter is being introduced. I can't object until I know what the purpose is, at this juncture I cannot ascertain the purpose.
[fol. 171] MR. MULLER: General Counsel introduced testimony through his witnesses that when Mr. Moritz talked to the group he told them that he had been trying to get them a raise for a long period of time. This is merely to tie up the testimony that, in fact, Mr. Moritz had tried to get them a raise for some length of time. It is just part of the whole story.
MR. MORAN: We have no objection.
TRIAL EXAMINER: Received.

(Thereupon, the instrument above referred to was received in evidence as Respondent's Exhibit 4.)

Q Now, after you talked to the men outside of the warehouse you testified you went back in the office? A I did.
Q Did you communicate with West Palm Beach at that time? A Yes, sir, I did.

* * * *

Q Go ahead, what did you tell them? A I told Mr. Burnup to, that the men had walked out and that they wanted a 15 cent an hour increase.
Q All right. A And Mr. Burnup was somewhat disturbed after my previous request but he said he would

take it under consideration and advise me shortly as to what I should do about the situation.

[fol. 172] Q Did he thereafter advise you? A He certainly did.

Q How? A In the form of a letter.

Q I show you what I have marked Respondent's Exhibit 5 for identification and ask you whether or not this is the letter. Read it carefully, please. A This is the letter.

* * * * *

TRIAL EXAMINER: When did you receive this letter?

THE WITNESS: I received that letter I think somewheres on the 23rd of September.

TRIAL EXAMINER: The document is received.

(Thereupon, the instrument above referred to was received in evidence as Respondent's Exhibit No. 5.)

* * * *

Q Now, subsequent to this walkout did you ever make a decision to put into effect this wage increase? A I did.

Q All right. With whom did you discuss it thereafter and how you would accomplish it? A I called my superintendent in, Mr. Doyle Tawney.

[fol. 173] All right, and what were your conversations for putting in the wage increase? A I told him we were to consider as to which departments we should consider a layoff and to consider the men that we might lay off and which of the men would have to be considered for layoff.

* * * *

Q What things were considered by you and Mr. Tawney? A There were 5 men considered.

Q Would you name them, please? A Herb Wills.

Q Go ahead. A Deveager—excuse me, there were six of them, Mr. Deveager, Mr. Richardson, Mr. Harmon, Mr. McKnight and Mr. Davis.

* * * *

Q Do you recall on direct examination saying anything to the effect that there was loafing going on and that Davis was the bigger loafer of the lot? A Yes, sir, I mentioned that in the warehouse to him.

Q Mentioned that in the warehouse? A Yes.

Q That was not outside? A No, sir.

Q Did you advise the employees at all that you were already—did you have any authority to grant a wage increase at this time? A Not what they were asking for.

Q Did you have the authority to grant any wage increase at this time? A I did, sir.

Q Did you inform any of the people that you were already authorized to grant a wage increase? A No, sir.

Q Why not? A Because they asked for so much more than I could give them.

Q You didn't try to compromise? A I didn't what?

Q You didn't try to compromise? A No, sir.

[fol. 193] Q Was it, what plan did you have at that time, if any, to increase wages since you had the authority? A That had to come from Mr. Burnup or Mr. Sims.

Q That had to come from either Mr. Burnup or Mr. Sims? A Or Mr. Sims.

Q What did they have to tell you on October, on September 21st in order to put a wage increase into effect? A I didn't get your question.

Q I say, what would they ought to have told you to make a wage increase effective, Mr. Burnup or Mr. Sims? A Well, Mr. Burnup or Mr. Sims wouldn't have had to tell me a thing if I hadn't been confronted with the meeting because I had a nickel for the men for an overall raise for the Plant employees in my pocket.

Q And for how long a period of time had you had an authorization in your pocket? A I'd say I got the authorization, I'd say in my pocket around the 14th of September.

Q All right, sir. When were you planning on announcing that? A Toward the latter part of the month.

Q Were you disturbed at this time when you were conversing with the group of employees? A No, sir.

Q Not disturbed in any manner? A No, sir.

• • • •

Q Now, after you told the men "I will have you an increase within 30 days," what did you do then, Mr. Moritz? A I went back into the warehouse then.

Q Back into your office? A No, back into my warehouse office, yes, sir.

Q What, if anything, to your knowledge—could you see the men from your office, sir? A Yes, sir.

[fol. 194] What did they do, if anything? A They went back to work.

• • • •

Q I see. Now, when did you contact West Palm Beach, Mr. Moritz? A Contacted West Palm Beach after this whole thing was over with as far as the walkout was concerned, and after the employees had gone back to work.

Q Was it later that afternoon or the same morning? A See they went back to work somewheres in the neighborhood of 10:00 o'clock and I imagine I got a hold of the West Palm Beach office sometime between 10:00 and 12:00, I don't really recall the exact time.

Q 10:00 to 12:00 is the best of your recollection? A Yes, sir.

Q Who did you talk to? A I talked to Mr. Burnup.

Q This was on the telephone? A Yes, sir.

Q And by Mr. Burnup we are referring to the President of the Corporation? A Yes, sir, Mr. Russell Burnup.

• • • •

Q Now, in your conversation with Mr. Burnup, Mr. Russell Burnup, what was his attitude, if any, when you told him what the men had done? A Well, I told Mr. Burnup that, everything that we have gone through heretofore.

Q Yes, sir. A And he was told that they wanted a 15 cent an hour increase.

Q Yes, sir. A And that they had gone back to work and what would his consideration be in the matter and [fol. 195] Mr. Burnup said well, he'd have to think that over, and that he would let me know very soon.

VOIR DIRE EXAMINATION

* * * *

MR. MULLER: All right.

Q Now, Mr. Moritz, in your considerations with Doyle Tawney on these seven men that you were considering for layoff, what was considered in the choice of Davis, Harmon and McKnight? A Their cooperative spirit, their employment in the particular department that they were employed in, and the anticipated business that we may be doing in the future in that particular department.

Q Was Herbert Wills discussed specifically? A Yes, he was.

Q In what regard? A Herbert Wills was discussed [fol. 174] in that, I wanted to let him go and Mr. Tawney said, "no, I don't want him to go because he's a hustler and he's doing an excellent job in the block department," and, "I don't think I would replace his hustling in that department."

* * * *

Q The discussion concerning Wills in relation to these other people as far as length of service, if any— A Regardless of how long he was with us?

TRIAL EXAMINER: What was said by you to Mr. Tawney about seniority, if anything?

THE WITNESS: Mr. Doyle Tawney said, "regardless of seniority I don't want to get rid of Mr. Wills."

Q All right, who else was considered? A Deyeager.

Q Do you remember what the considerations were surrounding Deyeager? A Mr. Deyeager applied for employment when he came to me in the office.

Q Just what was your discussion, what your decision concerning Deyeager was with Tawney? A I told Mr. Tawney that I could not let Mr. Deyeager go at this time because of the fact that he owed the Company money as well as some of the employees.

Q All right. Who else was considered for layoff at that time? A Mr. Richardson.

Q Did you discuss him with Mr. Tawney? A I did.

Q What was said? A He was a warehouse em-

[fol. 175] ployee at the time doing an excellent job. We decided we would keep him.

* * * *

TRIAL EXAMINER: What was said about Mr. Richardson and who said it?

THE WITNESS: Mr. Tawney advised me that he was a very good job in the warehouse, that he was working hard and that he was cooperating to the fullest extent and that therefore the consideration should rest that we should keep him operating in the warehouse.

Q After those considerations were any employees laid off? A 3.

Q Who were they? A I laid off Mr. McKnight, Mr. Harmon and Mr. Davis.

Q Did you, yourself have the conversations with those 3 individuals, the final layoff conversation? A I did, sir.

Q All right. Now, were you here when Mr. Davis and Mr. McKnight testified that they talked to you together? A Yes, I was.

Q Is that your recollection of the facts? A Yes, they were.

Q All right. Tell us what you said to them and what they said to you as best you can recall. A I told the boys—

MR. MORAN: Which ones did he—I'm sorry, if I could just find out which ones you're talking about?

[fol. 176] TRIAL EXAMINER: Davis and McKnight.

MR. MORAN: Thank you.

A I told Davis and McKnight, "boys, I'm laying you off at this time; things are slow and the cost of increased wages prohibits my keeping you at this time," and I said, "if things will pick up in the future you will be the first ones considered for re-employment."

Q That's what you told them? A That's right.

Q Who was there at that time other than them, if anyone? A Mrs. Burney was there, Yvonne Burney, and Doyle Tawney.

Q This took place in the warehouse office? A In the warehouse office.

* * * *

Q Okay. Anything else said? A I told them that I gave them an extra check and I told them, "here's my check to cover you over the next few days until you find some other employment."

Q All right. A That's all I said.

Q Did either Mr. Davis or Mr. McKnight at that time say anything further? A Yes, Mr. Davis asked me if it had anything to do with seniority rights, and I told him not necessarily.

Q Is that what he said, best you can recall? A To the best—oh, he added something else. He asked me for a letter.

Q What did he say? What did he say? A He said, [fol. 177] "can I have a letter to this extent," and I said, "no, I don't think it is necessary for you to have a letter but what do you want it for," and he said, "I'd like to have it for Unemployment Office," and I told Mr. McKnight and Mr. Harmon that if they wanted such a, if they would go to the Unemployment Office that, and the Unemployment Office wanted any information on them I'd give them the necessary recommendation.

Q All right. Anything else said that you recall at this time? A No, sir.

Q All right. Thereafter did you have a layoff conversation with Joe Harmon? A Yes, Joe came in later, he came into the—I went back to, got through at the warehouse office and went to the readymix office and Joe checked in later and I then had Mr. Harmon brought to me by Mr. Tawney and I told Joe that I had to lay him off because things were slow and because of the cost of increase in wages, and that if things picked up that he would be considered for employment at the time.

Q You told him that? A Oh, I did, yes.

Q And that's the same thing you told Mr. McKnight and Davis? A I did.

Q All right. Who was present at this time other than Harmon and yourself? A Doyle Tawney was with us.

Q Doyle was with you? A Yes.

Q All right, and this conversation took place in your office at the batchbin? A Yes, it did.

Q Thereafter did you recall any of those three individuals for work? A Yes, sir, I did.

Q Who? A Mr. McKnight.

Q Do you remember the date when he went to work? A November the 6th; Monday, November the 6th.

[fol. 178] Q November the 6th, Monday, all right. Did you recall Davis for work? A No, I didn't.

Q Did you recall Harmon for work? A No, I didn't.

Q Why didn't you recall those two? A I didn't recall those two boys to work because I had received serious threats. I considered them serious threats and I was very much upset by them and I didn't think I ought to have that type of employes in our employ.

Q Where did you receive this information? A I received the information from, through Doyle Tawney and he brought the man in.

Q What man? A Lyle Pate.

Q And what was this information?

MR. MORAN: I object, Your Honor. It is hearsay so far as this witness is concerned as to what, if anything, was ever said to Lyle Pate, whatever Lyle Pate tells him is the best evidence. Lyle Pate, if he's the one that received the threat—this gentleman started out by saying "I received serious threats," and I let it go, but so far the evidence is coming out he didn't get any threats, he's now going into a third person and I do not see how he can testify as to what threats were made since there's been no evidence to show that he was at all present when the threat was made.

TRIAL EXAMINER: What are you asking? You are asking what Mr. Tawney reported Mr. Pate had said?

[fol. 179] MR. MULLER: Yes, sir, yes, sir. Again, if the Company, through Mr. Moritz or through Mr. Tawney, did not rehire Harmon and Davis because of an allegation of a threat to do something by these two alleged 8(a) 3's and upon that information the Company did not rehire, I say it is immaterial whether or not Pate's information is accurate or not. That is theoretical, but that is the basis, apparently the basis of Mr. Moran's objection.

MR. MORAN: I'm sure the Trial Examiner is familiar with Reubin, I believe it is Reubin Footwear, this is

just employer's peril, and to allow this gentleman to put in hearsay as to why he didn't hire Mr. McKnight it was because he got threats, if they want to bring in and prove their threats that is something else again but this gentleman is certainly not the one to prove either a threat or anything along that line.

TRIAL EXAMINER: I am familiar with Reubin Brothers, that was my case. The objection is overruled.

* * * *

TRIAL EXAMINER: This does not go as to whether or not in fact threats were made.

[fol. 180] MR. MORAN: This is going to the fact as to why the Employer didn't rehire.

TRIAL EXAMINER: That's right, the information which the Employer had, either right or wrong, as you said the man may have acted at their peril.

MR. MORAN: All right, sir.

MR. MULLER: All right.

Q So, I asked you, I believe, the circumstances surrounding your receipt of this information. Go ahead. A I considered the information of —

Q Just how did it come to you? A It came to me by, through Doyle Tawney, my superintendent, and he advised me that Lyle Pate had been approached by two former employees.

Q Did he say who they were? A John, Bob Davis and Joe Harmon.

Q All right. A And in that conversation they had said that if they didn't get their jobs back they would put some dynamite underneath my sand bins, or silos, and when I heard this information I was upset enough to consider that as a—at the time I rehired to consider that enough not to want that type of employee working for me.

Q Well, I show you Respondent's Exhibits 1 and 2, which are in evidence, and ask you whether or not you drafted those letters to Mr. Davis and Mr. Harmon. A Yes.

[fol. 181] Q All right. A I wrote those.

Q After receiving this information from Mr. Tawney what, if anything, was done in an attempt by you or by

the Company to substantiate or test the validity of this information coming from Lyle Pate?

MR. MORAN: I object, Your Honor. So far this man has received, we allowed hearsay in at least twice removed to let this gentleman make a decision and now we are going to the fact as to what did he do to verify it. So far it is pure hearsay so far as this gentleman is concerned. It he wants to ask him if he talked to Lyle Pate—

MR. MULLER: That's what I'm asking him.

TRIAL EXAMINER: The objection is overruled.

A I talked to Lyle Pate with Mr. Tawney.

Q All right, and he verified it. In what manner? A He verified it in writing.

Q What type of a writing? A In longhand.

MR. MORAN: I object to the conclusion first of all, Your Honor, that he verified it.

TRIAL EXAMINER: We are getting to the writing right fast. I will hold your objection under consideration.

A In writing.

Q Sworn to? A Sworn to statement.

[fol. 182] Q All right. I show you what I have marked as Respondent's Exhibit 7 for identification and ask you whether or not that is the statement taken from Lyle Pate concerning the incident?

MR. MORAN: I object, Your Honor. I don't want the witness to see it.

MR. MULLER: What do you mean? I have to show it to him to identify it.

MR. MORAN: I object to identification of any statements since it is not this gentleman's, he didn't notarize it, I know he didn't notarize it and so far he's not present when someone's giving a statement. This is not the manner in which to get that statement. The only man to state that is the statement given is the man that gave it or took it and verified the signature, and everything else, but counsel is trying to get in there through this gentleman a sworn statement to a point very, very material in this case. The Company is alleging that the gentlemen issued threats against the Company and I say that this affidavit, if that's what it is, should not go in. This gentleman has not testified to anything else other than the fact the gentle-

man verified it in writing what he told Mr. Tawney. The gentleman wasn't even present when Mr. Tawney—

MR. MULLER: This is not his writing.

[fol. 183] MR. MORAN: Mr. Pate is the one to be called.

MR. MULLER: Mr. Pate will be called, he's outside.

* * * *

TRIAL EXAMINER: Is this the statement you had reference to by Mr. Pate?

THE WITNESS: Yes, sir.

MR. MULLER: That's all I wanted.

TRIAL EXAMINER: Where did you get it?

THE WITNESS: At my office, sir.

TRIAL EXAMINER: From Mr. Pate?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Or from Mr. Tawney?

[fol. 184] THE WITNESS: No, sir.

TRIAL EXAMINER: Mr. Pate?

THE WITNESS: Mr. Pate.

TRIAL EXAMINER: Did you see him write it out?

THE WITNESS: No, sir.

TRIAL EXAMINER: Did he hand it to you?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Go ahead.

MR. MULLER: Thank you.

Q Now, Mr. Moritz, to the best of your k..owledge does your Company have any written rules and regulations concerning the application of seniority? A No, sir.

Q You do not. Have you ever published orally either to individuals or to groups of individuals the application of seniority to layoffs? A No, sir.

* * * *

[fol. 185] Q To your knowledge in the operation through management in Melbourne or Eau Gallie have you or anyone else ever advised, either individually or to groups that seniority shall apply in layoffs? A No, sir.

Q You have not. As a matter of fact, to your knowledge in any past layoffs has strict seniority been applied? A No, sir.

* * * *

Q Okay. Now, did you lay off Davis, Harmon or McKnight or any one of them because of the walkout?

• • • •

A No, sir.:

• • • •

Q Mr. Moritz, following this walkout did you have a conversation with McKnight alone the next day or a couple of days later? A I did.

Q What was said by you and what was said by him? A I asked Mr. McKnight, "would you boys really have walked out on me in the manner and fashion that you indicated you would?"

Q And what did he say to you, if anything? A He said, "I would have."

• • • •

[fol. 186] CROSS EXAMINATION

Q (By Mr. Moran) . . .

• • • •

Q Now, you are the man in charge of the operations at this Melbourne Plant, Mr. Moritz? A Yes, sir.

Q In coming down the line of supervision who is directly under you, sir? A Doyle Tawney.

Q And directly under Mr. Tawney? A We have no others.

Q There are no other supervisors? A No, except Mr. Arthur *McCoy* at the Eau Gallie Plant.

Q Is that also under your supervision, the Eau Gallie Plant? A Yes, sir, and Mr. Arthur McCoy comes directly under my supervision at the Eau Gallie Plant.

Q Does anyone have the power to hire and fire there? A Just Mr. Tawney, Mr. McCoy and myself, and anyone above me, of course.

Q Who is above you, sir, in line of supervision? A Mr. Graham, Mr. Burnup and Mr. Sims.

Q And since we have had two Mr. Burnups mentioned in this proceeding you are referring to the elder Mr. Burnup? A Mr. Russell Burnup.

Q Now, on direct testimony you related the incident which occurred in the warehouse on September 21, 1961

when you met with a group of employees. Do you recall that? A Yes.

• • • •

[fol. 187] Q Did you see Mr. Tawney upon your arrival at the Plant? A I did.

Q What was he doing? A He was standing there talking with the men when I drove up.

• • • •

Q Did you call Mr. Tawney over? A No, Mr. Tawney came over to see me.

Q And then did you receive a call that morning from Mr. Tawney? A No, sir.

Q And then you and Mr. Tawney had a conversation? A Just a few words.

Q Yes, sir, this was still outside the building? A "What's up."

Q But, this was outside the building? A That was outside the building.

Q All right, sir, and what did Mr., your first words were, "what's up" to Mr. Tawney? A That's right.

Q And what did Mr. Tawney reply, if anything? A "The men won't go to work unless they got a raise."

Q "The men won't go to work unless they got a raise?" Say anything else? A As far as I remember that's all, I said, "come on into the office." Then, we walked into the office.

Q Then the both of you walked into the office? A That's right.

Q All right, sir. What happened when you walked into the office? A Mr. Tawney says, "what will we do about it?"

Q And your reply, sir, if any? A "Take them over to the warehouse and we'll talk to them over there."

[fol. 188] Q How long would you say that conversation took, sir? A Certainly not more than a minute.

Q Did you leave immediately for the warehouse? A We did.

Q You say "we", who is "we"? A The entire group of men.

Q I'm talking about you and Mr. Tawney. A Mr. Tawney and myself.

Q You immediately left for the warehouse? A That's right.

Q Did Mr. Tawney go down and see the group? A He told the boys I wanted to see them in the warehouse.

* * * *

Q All right, sir, and now you're out with the men. What location of the warehouse was that, sir, say with respect to your office? A About 35 feet from the office door is where I parked myself.

Q All right, sir. A Which would have been on top of the pile of metal goods. I sat down on the top of the pile of metal goods.

Q You sat down? A Uh huh.

* * * *

Q Now, who spoke first, you, Mr. Tawney, or somebody from the group? A I did.

Q What did you say, sir? A "What do you boys want?"

Q Did you receive any answer to that question? A "We want a raise."

[fol. 189] Q And you received that right away or was it a matter of minutes, seconds, or what? A It was a matter of seconds.

Q Who answered your question? A Bob Davis.

Q Did you say anything before Mr. Davis answered you? A Yes.

Q What did you say? A There was a lull and I asked, "well, which one of you men will tell me what you want?"

* * * *

Q All right, sir. Now, you have the answer "we want a raise" by Mr. Davis. What occurred after that, if anything? A Well, I told the gentlemen that I couldn't quite see fit to give an overall raise of the magnitude that Mr. Davis asked for.

* * * *

Q All right, sir. Did you continue speaking or did Mr. Davis or anyone else make any comment after your statement of that? A No, I asked him if I didn't give that raise at that time what would happen.

Q What, if any, reply was made and who made it? A Bob Davis replied, "if we don't get the 15 cent raise we'll quit."

Q Said "we'll quit?"

* * * *

Q Did you ever ask during this conversation if anyone would stand up with Mr. Davis? A No, sir, I had a [fol. 190] spokesman for the group and that was all that was necessary.

Q You didn't ask if anyone would stand up with him? A No, sir.

Q You're sure of that? A Yes, sir.

* * * *

Q All right. Is Mr. Tawney the only one that went with you, sir? A Yes, sir.

Q All right, and then what occurred, if anything? A I asked my men if they'd reconsider their walkout.

Q Did you ask who the spokesman was out there? A No, sir, that was established.

Q Was Mr. Davis there when you came out? A No, sir.

Q So, you asked the men in general— A If they would reconsider.

Q All right, sir. Did anyone answer you, sir? A Yes, sir.

Q Who was that? A Mr. Harmon.

Q Mr. Joe Harmon? A Yes, sir.

Q What did he say? A He led into conversation in respects to the raise.

Q Well, what did he say, best of your recollection? A He asked when they were going to get a raise.

Q He said to you, "are we going to get a raise?" A Yes.

Q And your reply to him, if any? A I told him that, it was at that point I asked him what basis they request such a raise, and Mr. Harmon hadn't answered the question, and—

Q He did not answer that question? A No.

[fol. 191] Q All right. A Mr. Davis drove up and Mr. McKnight, I believe, was with him and Mr. Davis, I then asked on what basis that they request this raise.

Q All right, sir. A And Mr. Davis replied, "well, your competitors are paying that much more money," and he says, "I think as long as your competitors are paying that much money and you are here and certainly as big as they are you should be able to pay that much money."

Q Those were his exact words? A Come awful close to it, sir.

Q I asked you if they were his exact words. A I think so, sir.

Q All right, sir. What, if anything, did you say to Mr. Davis and what did he say to you? A I said to Mr. Davis and the group that if my competitor was paying such monies of which I knew nothing, that a demand of this nature was not unreasonable.

Q All right, sir. A And that I would check into it very thoroughly.

Q Anything else, sir? A Anything else what, sir?

Q Was there any more of that conversation or was that it? A That was all of that part of the conversation.

Q Did you go back in the warehouse then, sir? A No, sir.

Q What did you do? A Mr. Davis asked another question.

Q He hadn't asked any, yet, had he? A He said "well, if we go back to work are we going to get this raise," and I said, "all of you, Mr. Davis, all of you, you're asking me for an overall wage increase of 15 cents that I cannot grant you because I do not have that authority. I'll see what I can do for you," and Mr. Davis, [fol. 192] thereupon Mr. Davis—I said, "is that good enough," and he said, "no," he says, "I want to know when we're going to get it," and I said, "I don't know how much of an increase I'll be able to give you. I'll take it up with the proper authorities and I'll have you an increase within 30 days," within a month, I think my—it was within a month I said or within the month, I forgot just exactly how I put it.

Q So, you definitely promised them a wage increase within either a month or 30 days? A Yes.

* * * *

Q Was he disturbed about what had happened? A You know, I answered you a while ago and said that I wasn't disturbed?

Q Yes, sir. A May I correct myself there?

Q Feel free, sir. A A problem of this kind always disturbs management.

Q Yes, sir. A So, to make a cold statement that you're not disturbed is not correct, I'd like to correct myself there.

Q Sure. A Certainly.

Q You were disturbed? A Management is always disturbed about that, and Mr. Burnup was disturbed; he's a very calm man and I couldn't see his reaction through the phone.

Q No, sir. A So, his answer to me was very plain and that is, "well, I'll have to consider it and we'll let you know a little later."

* * * *

Q All right, sir. Now, what happened after you have now talked to Mr. Burnup with regard to this increase, Mr. Moritz? Did you finally make the decision to make the wage increase? A I didn't make the decision until I got Mr. Burnup's authority.

Q Or whatever was necessary? A That's right.

Q Was it your decision, final one as to when it would go into effect? A No, sir.

Q Were you instructed by your West Palm Beach office as to when to put it into effect? A I could put it into [fol. 196] effect effective the November 1st payroll, October the 1st payroll.

Q All right, sir, and who gave you those instructions? A Mr. Burnup.

Q In other words, you made no decision at all with respect to this wage increase? A No, but it fell within the category of our promise, so—that we would try to do something for them within a month's time and that certainly was within the scope of that time.

Q Mr. Doyle Tawney have anything to do with the decision in making the wage increase? A No, sir.

* * * *

Q I say, when did you have the conversation that you related on direct examination with Mr. Doyle Tawney with regard to a layoff? A After I got the letter from Mr. Burnup, between that time and the end of the month.

Q All right, sir. Do you recall when you got the letter from Mr. Burnup? A No, sir, I think that I got Mr. Burnup's letter either on the 23rd or the 24th.

Q All right, sir, of September? A Of September.

* * * *

Q All right, sir. What were the considerations in this layoff, Mr. Moritz, Tawney—I'm sorry, Mr. Moritz? A The anticipated amount of business.

Q Uh huh. A In the various departments.

Q All right, sir. A And the capabilities of the peo-
[fol. 197] ple serving us in these various departments, and the manner in which they handle their jobs.

* * * *

Q How many employees do you have at this particular Melbourne Plant, sir, approximately, if you don't remember exactly. A At the present I would say I have 50.

Q All right, sir. A Laboring employees.

Q All right, sir, and by laboring you mean differentiated from supervisors? A Drivers primarily.

Q I believe you gave a list of people who you and Mr. Tawney discussed with regard as to who was to be laid off. One of them was Herb Wills. A Yes.

Q The other one was Mr. Deyeager. A Yes, sir.

Q Another one was Davis, Harmon and McKnight? A Yes, sir.

Q And the sixth person was Mr. Richardson? A Right, sir.

Q Now, I'll ask you who was Mr. Deyeager? A He was a ready-mix truck driver, sir.

Q You're sure of that, sir? A Yes, sir.

Q You're not getting him confused with Mr. *Basil Yeager?* A Yeager.

Q Who is Mr. Deyeager, sir? A He's the warehouse clerk.

Q How long has he been employed by your Company? A Deyeager?

Q Yes, sir, the one you say was considered for a layoff. A Mr. Yeager, I would like to correct myself, it was Mr. Yeager.

[fol. 198] Q Now, it's Mr. Yeager? A Yes, now, it's Mr. Yeager.

Q All right, sir. What is his first name? A I don't know his first name, sir.

Q If I call it to your attention is it Basil, if you recall? A Basil Yeager, yes, sir.

Q How long has Mr. Deyeager, the gentleman whose name you first mentioned, been employed by your Company, sir? A Oh, about 14 months.

Q And what is his job, sir, Mr. Deyeager? A Warehouse clerk.

Q Mr. Basil Yeager? A Ready-mix driver.

Q Is he still working for your Company, sir? A No, sir.

Q He quit, fired, or what? A No, sir, he quit.

* * * *

Q The list that was considered for layoff was Mr. Herb Wills, Mr. Basil Yeager, Davis, Harmon, McKnight and Richardson? A Yes, sir.

Q Why did you pick those six men, sir? Did you pick them, by the way, or did Mr. Yeager, not Mr. Yeager, Mr. Tawney? A No, we discussed them, Mr. Tawney and I discussed the employees to be considered.

Q All right, sir. How did you say pick, why did you go to Mr. Herb Wills? A Well, these six men were actually the youngest in the group.

Q What do you mean by— A They hadn't been with us long enough, as long as the others had.

Q I see. Well, these were the six youngest? A I would—no, I don't think so.

Q These weren't the youngest employees for period of service? A They were at the—yes, it was at the ready-

[fol. 199] mix, yes, at the Melbourne ready-mix plant, at the Melbourne warehouse I would say, yes.

Q Is that why you picked these six, sir? A Yes, sir, for consideration.

* * * *

Q Have you ever heard of an employee by the name of *Minton Hooten Jackson*, Jr.? A Yes, sir.

Q When was he hired, sir? A He was hired sometime in August, sir; September, August—September—August, sometime in August, somewheres around the 8th or thereabouts.

Q Of 1961? A Right, sir.

* * * *

Q Would you say that Jackson, Jr. is—Minton Hooten Jackson, Jr. did not drive a dump truck out of your Melbourne operation? A He drive a dump truck after that, yes, sir.

Q Before that layoff he never drove a dump truck? A He drove a dump truck between Cocoa and Melbourne, yes, sir.

Q Why didn't you include him? A He's a darn good worker, sir; he did me a good job over there in Cocoa.

Q Did you have complaints against these six individuals that they were not good workers? A Their output was to be considered in the departments that they worked in.

Q In other words, you now have another consideration, you didn't—is it still your statement that you considered the lowest six employees in seniority in deciding who to lay off? A Yes, sir.

[fol. 200] Q All right, sir, but Minton Hooten Jackson, Jr. would come within that classification, is that not true, lowest in point of seniority? A I think you could term it that way, yes, sir.

Q How about an employee by the name of Hune Hensley? A What about him, sir?

Q What do you know about him? When was he hired? A He's a block truck driver.

Q When was he hired, sir? A I don't quite recall, sir.

Q Would it have been in August of 1961? A It may have been, sir.

Q Could it have been in September? A It may have been, sir.

Q Well, who picked out these six individuals as being lowest in point of seniority, sir? A We didn't say we picked them out lowest point in seniority.

Q These were not—I'm sorry. A You said youngest men in departments we thought we might be able to make a layoff in.

MR. MORAN: May I have just a moment?

TRIAL EXAMINER: What does that mean?

THE WITNESS: Well, sir, we have a ready-mix department, block department, sand department, ready-mix warehouse department.

[fol. 201] TRIAL EXAMINER: Did all three of these men come from the same department?

THE WITNESS: No, sir, two of them came out of the ready-mix department and one of them came out of the sand department.

TRIAL EXAMINER: Who came out of sand?

THE WITNESS: McKnight.

TRIAL EXAMINER: Anybody else in that department laid off?

THE WITNESS: No, sir.

TRIAL EXAMINER: Anybody else in the other department laid off?

THE WITNESS: In the ready-mix department?

TRIAL EXAMINER: Except the two?

THE WITNESS: Just those two, sir.

* * * *

[fol. 202] Q All right, sir. Would dump trucks come under what department, sir? A Sand.

Q Minton Hooten Jackson, Jr. drove a dump truck? A Ever so often, yes, sir.

* * * *

Q All right. Now, you said with regard to final choosing who was to be laid off you looked at the following grounds, I think, cooperative spirit, is that true, sir, of the employees? A Yes, sir.

Q How did you judge their cooperative spirit? A The manner in which they hustled.

Q The manner in which they what, sir? A The manner in which they hustled to get the job done.

Q Take Mr. Davis, what complaints did you have about his hustling? A Not much on hustling.

* * * *

Q (By Mr. Moran) So, you had never during the course of Mr. Davis's employment other than the occasion in the warehouse when the boys were asking for an increase and he became the spokesman, had never told him personally that his work was not meeting with your satisfaction? A No, sir.

* * * *

Q All right, sir. When did you first become aware that he was not, I use your word, a hustler? When did [fol. 203] you first become aware of that? A Oh, I'd say about two months ago, two months prior to the layoff.

Q Two months prior to the layoff? A Yes.

Q And the layoff occurred September 29th? A Yes.

Q So, on or about July 29th you became aware that he was not a hustler? A That's right.

Q Now, what was he doing on or about July 29th that led you to the belief Davis was not a hustler? A Generally men walk, after they come back from a job they walk in and out of the, say for instance, the Ready-Mix drivers' truck room where they take their tickets, and they get sometimes in a nasty habit of lingering there too long and not picking up other chores that may be done without having to be continually told to go out there and do them, and I have brought these things out in meetings with these boys, if you don't have anything to do don't continuously let me have to ask you to go out there and do this and do that because you can look about you, you can see the many things that have got to be done in this yard. I am not sending you home, I am trying to have you take home a fair pay check but for heaven's sakes get out there and do these things that are visibly necessary to be done in respects to cleaning up the yard or gathering block or gathering the steel or keeping the trucks in the necessary shape, and so forth and so on.

* * * *

Q All right, sir. Now, you said you saw, and if Im wrong you correct me, you said there were a lot of employees who did this, loafing around and weren't hustlers, is that correct? A Yes, sir.

[fol. 204] Q How many would you say out of your group of approximately, I think you said 50, were down here or are you only referring now to the truck drivers? A I am referring to the drivers.

Q All right, sir, and how many would that include approximately in number? A Oh, no an average of 12, 15.

Q Out of the 12 how many were not hustlers in your estimation? A Oh, three, four.

Q Who were they, sir? A Well, you had Mr. McKnight.

Q Mr. McKnight was not a hustler? A He was not a hustler.

Q All right, sir. Did you ever complain to Mr. McKnight personally or have Doyle Tawney complain to him personally? A No, again other than to call it to the boys' attention to keep hustling.

Q All right, sir. Now, we have Davis and McKnight are not hustlers. Who else? A Mr. Harmon was not a hustler.

Q Mr. Joe Harmon was not a hustler? A No, sir.

Q And you didn't ever tell Mr. Tawney nor did you ever talk to Mr. Harmon about this? A He was included in the boys.

* * * *

Q All right, sir. Of your own knowledge did Mr. Harmon ever get a pay raise, sir, since he joined the company? A Yes, sir.

Q Did you okay that pay raise? A Yes, sir.

Q How many did he get, of your own knowledge? A One.

[fol. 205] Q That all he got was one? A I think so, sir.

Q If he had gotten two, would it surprise you, sir? A Yes, sir.

Q It is your belief here today that he only got one during his period of employment with Burnup and Sims? A I think so, sir.

Q All right. Well, either yes or no. A Yes, sir.

Q All right, sir. Now, when to the best of your knowledge—first of all, how much was the pay increase for, sir? A I think I gave him a dime.

Q You gave him a 10 cent wage increase? A Uh huh.

Q And when did you give that wage increase, sir? A I believe shortly after I put him on the Ready-Mix truck.

Q Well, what day was that, sir, as near as you can remember? A I don't know, I think it was about a month after he was with us.

Q Had he shown himself not to be a hustler for the first month? A He was not fitted for block truck driving.

Q He was not fitted for block truck driving? A No, sir.

Q So, you transferred him and gave him a 10-cent wage increase? A Yes, sir.

Q Had you already made, had you already come of the belief that Harmon was not a hustler at the time you gave him the 10-cent wage increase? A Not particularly, sir, no.

Q You didn't. When did you first confirm the fact in your own mind that Harmon was not a hustler? A After he got on the Ready-Mix truck.

Q In other words, he was unsatisfactory in the block truck and he was not a hustler in the Ready-Mix Department either? A He wasn't unsatisfactory, he was [fol. 206] not in my opinion physically capable to do the chore of block delivery out of, off the block truck.

Q Well, what was the fault with him as far as the Ready-Mix driver went? A Well, as I say, he wasn't a hustler.

Q Well, what does that mean, sir, the fact he wasn't doing other jobs around the plant? Is that all that means? A That's right, sir, loafing on the job when they came back from making a delivery of Ready-Mix.

* * * *

Q Did you know he was proving to be unsatisfactory in the Block Truck Department? A He wasn't capable in the Block Department, we believed he might make a better Ready-Mix truck driver.

* * * *

Q All right, sir. How soon after he started in the Ready-Mix Department did you for the first time notice him wasting time in the Ready-Mix room? A Not too long after he became a Ready-Mix truck driver.

Q Well, was it a day or week? A No, I'd say within a week or so.

Q Within about a week for the first time you noticed he was wasting time in the Ready-Mix room? A That's right.

Q Did you discuss this with anyone, Mr. Doyle Tawney of your— A Yes, sir, I discussed it with Mr. Doyle Tawney that we should get these drivers out of the Ready-[fol. 207] Mix room and get them to understand that they couldn't linger in there and to get busy outside.

* * * *

Q All right. Up through July—well, about a week after he started on the Ready-Mix trucks you had seen Joe Harmon—was this the first individual you had seen wasting time in the Ready-Mix room? A Oh, no, sir.

Q Who else had you seen wasting— A There had been others.

Q Others than McKnight and Davis? A Oh, yes.

Q Who else? You had 12 drivers, you mentioned three you saw wasting time in the Ready-Mix room. A We had prior to that a fellow by the name of Billy Washington. He was a good loafer.

Q So, this was not an uncommon thing, then, to waste time? A I treated it accordingly.

Q As rather uncommon? A I treated it accordingly.

Q All right, sir. A By continuously calling it to their attention.

TRIAL EXAMINER: In other words, you were continually having trouble with it, isn't that true?

THE WITNESS: That's right, sir.

Q Now when, Mr. Moritz, if you can recall, you said you were in the, if I am wrong you correct me, were you in the dispatch room when you saw Joe Harmon wasting time in the Ready-Mix room? A In the dispatch room, [fol. 208] in the back of it, on the yard, any number of

places that you might find these Ready-Mix truck drivers at the Ready-Mix room.

Q I am talking about Joe Harmon. A Joe Harmon, McKnight, Davis, yes, sir.

Q Yes, sir, what? A I found them loafing.

* * * *

Q Do you ever recall meeting Mr. Harmon in the plant when he was cleaning out his Ready-Mix truck and complimenting him on his work, telling him he was doing a good job? A Yes, sir.

Q When did that occur, sir? A That occurred on several occasions.

Q All right, sir, and he was already in the Ready-Mix Department? A Yes, sir.

Q And on several times you complimented him? A Yes, sir.

Q All right, sir, and yet you had still formed the opinion that he was not a hustler? A That's right, sir.

Q All right, sir. Now, how about Mr. McKnight, he was not a hustler either, was he? A No, sir.

* * * *

Q The best of your recollection when did he start working for the company? A Some time in July.

Q Some time in July? You know we are talking about Mr. McKnight? A Yes.

Q Now, how soon after he first became employed did [fol. 209] you notice he was taking an hour for delivery I believe you said should usually take 35, 45 minutes? How long did you say such a delivery should take? A About 35, 40 minutes.

Q On this first occasion how long did he take, if you recall? A The first time it was called to my attention he took one hour and 15 minutes.

Q All right, sir. Who called it to your attention? A The dispatcher at the Eau Gallie plant at that time.

* * * *

A My Ready-Mix drivers could also be asked to hustle and to hurry it up a little bit more by my dispatchers because of the fact that we want to get material out.

Q Surely. The fact remains— A It's a general thing to get them to understand that they should hustle to get the materials—

Q That was the theme of your meetings and also Mr. Tawney's talk, wasn't it? A Oh, yes, sir, that's the thing all the time.

Q Now, had you ever given any instructions to anyone else to instruct individuals that perhaps they could hustle a little more? You have given instructions to your son to notify McKnight. Did you give any instructions to anyone else as to individuals that they should hustle, that they should tell individuals they should hustle? A I might have relayed that to—yes, sir.

Q Who else? A To my dispatcher in my warehouse.

Q All right, sir, what did you tell him? A To keep my men rolling, to advise them to get back to the job, [fol. 210] back to the warehouse as quick as possible, not loaf on the job.

* * * *

A I had a man by the name of O'Keefe working out of my warehouse.

Q All right, sir. A And it was called to my attention to the warehouse operator that he was, that is, the dispatcher, and it was called to my attention that the man was not getting back and forth to the job as he should and that it was generally believed that he was loafing and I told Mr. *Peraziak* at that time, I said, "Well, get on him, tell him you know it and tell him to cooperate and get back and forth quicker."

Q All right, sir. Now, who was that driver? A O'Keefe.

Q His name was O'Keefe? A Uh huh.

Q All right. Are there any other instances that you can recall? A I let that man go.

Q You let him go? A Uh huh.

Q Why did you let him go? For not hustling? A Yes, for generally shirking his duties.

* * * *

Q All right, sir. You have related one instance where McKnight shortly after he was hired was taking too long

to go to a delivery site which you estimate a reasonable delivery time in coming back should have been 35 to 40 minutes, he took about an hour. Did any other truck drivers take an hour to make that delivery? A I don't know, sir.

[fol. 211] Q In other words, the only way that you knew about McKnight was because your son called it to your attention? A Called it to my attention.

Q All right, sir. Did you, yourself, ever talk to McKnight about it? A No, sir.

Q All right. Were there any other instances, wherein— A May I correct that statement?

Q Surely. A I would like to say yes, sir, at group meetings I would not point out an individual but I would say please—

Q A general— A —get back and forth, gentlemen, and waste as little time as possible.

Q I am just talking about specific instances. A No, sir.

Q All right, sir. When was the next time it came to your attention John McKnight was not a hustler and was wasting time? A Specifically?

Q You said this one happened, the first one happened— A Specifically?

Q Not the exact date, if you can't remember it. A From time to time.

* * * *

Q In other words, this would be—was he also supposed to do extra jobs returning from a sand truck delivery? A Most certainly.

Q What kind of a job would that be, cleaning up the yard? A Any kind of job, cleaning up the yard, anything when they were not busy.

* * * *

[fol. 212] Q All right, sir. What was the system of giving pay raises here, if there was a system? Was there a general, after one month or two months you got a raise? A No, sir, not necessarily.

Q How would you get a raise if you would get one? A It depends on a man's output, his general attitude,

his cooperative spirit, how he goes about keeping things going, the manner in which we observe his activities.

Q Who is "we", sir, the manner in which "we" observe his activities? Who is "we"? A Doyle, myself. The way people talk about our drivers, their recommendations that may come from customers.

Q Did you receive any complaint from any customers regarding Davis, Harmon or McKnight? A I didn't say I did.

Q I am just asking you. A I didn't say I did.

Q I ask you. A No, sir.

Q All right, sir. Now, then, your only complaint against these three individuals was the fact that they were not hustling? A That's right, sir.

* * * *

Q All right, sir. What, if anything, did Mr. Harmon ask you? A He asked me if it would be possible for me to put him to work at the Cocoa plant. Q All right, sir. What did you tell him about that? A As a Ready-Mix truck driver.

Q What did you tell him about that? A I told Mr. Harmon that at such time as when we did open that plant—

[fol. 213] Q Yes, sir. A I would consider doing that but not to think that this would happen any time soon because I didn't know exactly when it would be opened and I still don't know as to just exactly when it will be opened.

* * * *

Q And he asked what his chances were to get on back at the Melbourne plant? A Yes, sir.

Q He did ask that, the other two drivers didn't ask that, did they? A No, he asked me if he would be able to get on at the Cocoa plant, he didn't say anything else about the Melbourne plant. I had told the gentleman when I laid him off—

Q What did you tell him? A That I laid him off because of the fact that things had slowed down in his department and that the increase, the wage increase made the cost prohibitive. I told him that whenever things

picked up that he would be one of the first to be considered and then he asked me about the Cocoa plant and I gave him his answer in respects to the Cocoa plant, and other than that I don't recall any conversation with Mr. Harmon.

Q In other words, you told him at the first opportunity he would be called back to your Melbourne plant? A That's right, yes, sir.

• • • •

Q Do you recall who left the office first when Davis and McKnight were being terminated, sir? A Both of them left at the same time.

[fol. 214] Q Did McKnight say anything to you at that time or did Davis do all the talking? A Both of them talked.

Q What did Mr. McKnight have to say? A I think it was Mr. McKnight that asked me if it had anything to do with seniority rights.

Q You think that was Mr. McKnight? A I think so, sir.

Q All right, sir. What did he have to say about it? A That's all he asked me.

Q Just if the layoff had anything to do with seniority rights? A That's right.

Q Could it have been Davis that said that or are you of the opinion— A No, sir, I am of the opinion that it was McKnight that said that.

Q All right. Now, despite your dissatisfaction with the fact that Davis, McKnight and Harmon were not hustlers, it is your position here today you did not lay them off permanently, is that so? A That's right, sir.

Q And that you communicated this information to them? A Yes, sir.

• • • • •

Q So, on November 6th Mr. McKnight is hired back, sir? A Yes, sir.

Q Do you remember what salary he was hired back, sir? A I gave him a nickel increase over what he left on.

Q All right, sir. Did you re-hire Mr. McKnight personally, sir, or— A. No, sir.

Q Who went out to find him? A Mr. Doyle Tawney.

* * * *

[fol. 215] Q All right, sir. Now, to the best of your recollection when was McKnight discharged from his second term of employment with Burnup and Sims? A September the 29th.

Q I think I must have you confused. I think you mean November 29th, sir. A November the 29th, yes.

* * * *

A Yes, and I saw John in the front office and I told Yvonne, I said, "Ask Doyle and John McKnight to come back here, I want to talk to them."

Q All right, sir. Did they subsequently come back? A Yes, they came back to the office.

Q Did Mr. Tawney stay with you while you talked to Mr. McKnight? A Yes. I said, "Doyle, I understand that John has broken another axle."

Q All right, sir. A And he said, "Yes, he did," and I said, "What about it, John," and John said, "Yes, I did." Then I said, "Well, John, that's the second one, isn't it, this month?" He says, "Yes, sir, it is," he says, "the first one wasn't my fault, though."

Q Did you ask him why not? A No, sir, he didn't try to explain why the second one, why the second one was and so I called John, I said, "John, well, I'm sorry, you're just too hard on my equipment, and I'm discharging you as of right now."

Q And now the reason behind your discharge was the fact he had broken two axles in one month? A I said he was too hard on my equipment, sir.

* * * *

[fol. 216] Q What did McKnight say or you say, if anything, after you told him you had to discharge him? A Mr. McKnight said, he did say something—let me think. He said, "All right," and he says, "will you give me a letter to that effect?" I says, "No, I won't give you a letter to that effect. You know why you're been discharged and that's sufficient."

Q Did you use the word "discharge" this time or did you use the word "layoff"? A No, sir, at this time the gentleman was discharged.

* * * *

Q Now, with regard to the layoff of Davis, Harmon, and McKnight, which occurred on the 29th of September, did you make the decision, the final decision of the company as to who it was going to be terminated, sir? A Yes, sir.

Q You and you alone, sir, with recommendations from Doyle Tawney? A Yes, sir.

Q It was your decision? A Yes, sir.

Q When did you make that decision? A I made that decision on September the 27th.

Q September the 17th? A I believe so, sir, yes.

* * * *

Q When did you have the conference with Mr. Tawney with regard to the six individuals who were under consideration to go? A Between September the 21st, 22nd, 23rd, September 23rd, we talked about it Septem-
[fol. 217] ber the 24th—no, no, we talked about it September the 25th and on the 23rd—and we talked on it, talked about it on the—excuse me, we talked about that on Monday the 25th and the 26th.

Q Only those two days? A Monday and Tuesday, the 25th and 26th, yes, sir, that's right.

Q Of September, sir? A Yes, sir.

Q And was this the first time— A And from there on I weighed all the problems that each one of these men might have had and it was late the 27th that I decided that I was going to do that.

Q Now— A And I told Doyle Tawney on the 27th and about in the morning, on the morning of the 28th I believe I told Doyle.

* * * *

Q Now, you said with regard to Herbert Wills you wanted to let him go? A Yes, sir, I was considering letting him go.

Q Why did you want to let him go, you think he wasn't a hustler? A No, not particularly, sir. I didn't really know Herbert Wills as well as I perhaps should have.

* * * *

Q You personally wanted to let Wills go, is it Wells or Wills, W-I—

MR. MULLER: W-I-L-L-S.

A I had to make consideration in respects to the ex-
[fol. 218] pense of the layoff and that was why I though of Wills in that particular category.

Q Well, there wasn't anything wrong so far as you know with his work capacity? A No.

Q Well, what did you have to take into consideration with respect to Mr. Wills in the expense? How much did he make an hour? A I think that Mr. Wills was making $1.80 an hour.

Q All right, sir. Now, why should that convince you that Wills should be the one to go? A Well, he was one of the drivers.

Q Well, so were the other five. A That's right.

Q But you said, you were willing that Wills should go. Why, if you know? A Well, I was considering letting Mr. Wills go because I was not fully aware of what I might anticipate in that block department.

Q You didn't know exactly what the block— A No, sir, Mr. Tawney informed me that Mr. Wills was one of the best block truck drivers that he had ever had and that he didn't think that we ought to let Mr. Wills go because that boy could really deliver concrete block, was back and forth in a hurry and did a darn good job delivering them. So, I discounted Mr. Wills on Mr. Doyle Tawney's recommendation.

* * * *

Q Now, before, when you were, you said, you mentioned the name Mr. DeJeager, is it Mr. Yeager that owes the company money? A Yes, Basil Yeager.

[fol. 219] Q Is that the only reason you kept Mr. Basil Yeager? A Well, the gentleman was destitute.

Q He was destitute? A Yes, he had a pretty hard time with his family. In fact, when he first came to work

for use he indicated that he was hard up and that he needed a job desperately.

Q All right, sir. A And he hadn't been working for me but a couple of days and wanted to borrow some money.

Q Did he come to you to borrow that money? A Yes, he did.

Q He was only there a couple of days? A Yes, sir.

Q All right, sir. A I told him, well, as far as I was concerned I could let him have a twenty dollar bill, and he appreciated that, and then borrowed some money from Doyle as well as I can remember.

Q Do you have any idea— A And then this boy got this cement poisoning and his feet were all blistered up and broken up to the extent that if I had laid him off he couldn't have done anything else anyway and he was not well and his wife was, as far as I understood, was not well, and I decided to keep the man on for that reason. He hadn't given me any other—well, what do you want to put it? I just, I just felt sorry for the guy. See? I just felt sorry for his condition and his feet and I felt that he picked that up in my yard, I certainly didn't know he was susceptible to anything like that. He could hardly walk around. So, I just didn't let him go. As a matter of fact, the man finally, I think he put in a day-and-a-half and decided he couldn't take it anyway and he quit.

[fol. 220] Q Still owing the company money? A Yes, owing the company money, sir.

* * * *

Q How about Mr. McKnight? What department was he in? He wasn't in the Ready-Mix Department? A He was in the Sand Department.

Q Why didn't you lay off another Read-Mix driver? A There was no reason to lay off another Ready-Mix driver. See, if I have got so many Ready-Mix trucks and if I can keep eight Ready-Mix trucks busy, all right. If I can keep nine Ready-Mix trucks busy, okay. It, it's more or less to be decided on as to how many truck drivers I will have because of anticipated business.

Q Well, then, is it your recollection that only these drivers, the Ready-Mix drivers drove these, drove Ready-Mix trucks after this layoff, or did other people drive Ready-Mix trucks? A After the layoff?

Q Yes, sir, did anyone else? A After the layoff we had some Ready-Mix trucks driven by other drivers, yes.

Q All right, sir. So, you were keeping trucks busy by people other than your drivers, your drivers kept trucks busy and you even had to take people out of other departments? A That was common practice.

Q That practice didn't change, isn't that true? A That hasn't changed yet, never will.

Q The men were working overtime right up to and through the layoff? A Yes, sir.

Q About how many hours on the average per week [fol. 221] would they work overtime? A Oh, 11, 12, 13, 14, 15—

Q Per man? A Yes.

Q All right, sir. A It could vary.

Q In fact, some of your foremen drove Ready-Mix trucks during this period after the layoff, didn't they? A What are you referring to when—who are you referring to?

Q Wait until I get a name and we'll be back. A All right.

MR. MORAN: May I have just a moment, please?

Q Do you have an employe, an employe, and by foreman I don't mean he is listed to be supervisor but an employe by the name of Earl Titus? A Uh huh.

Q What was his job at the plant at this time? A Earl is a maintenance man, maintenance mechanic over all, a boy used in all of my departments, Ready-Mix, block.

Q He drove Ready-Mix trucks? A He drove Ready-Mix trucks, he drove block trucks, he drove a sand truck, he drove a flatbed, he drove everything that was available.

Q How many other people would you call in from other departments to drive Ready-Mix trucks after this layoff? A I could have called on some of my mechanics.

Q It is true that you did, isn't it? A Oh, certainly, it is, sir.

* * * *

[fol. 222] Q Now, you testified that Mr. Yeager, whom you kept, left the employ of Burnup and Sims by resigning, quitting, or of his own accord, anyway, is that not true? A Yes, sir.

Q All right, sir. So, when did he leave the employ of Burnup and Sims, to the best of your recollection?

* * * *

A To the best of my recollection I believe it was somewheres around October the 8th.

* * * *

Q All right, sir. Now, you have an opening, a position vacant? A Yes, sir.

Q In the Ready-Mix Department, is that not so? A Yes, sir.

Q Why didn't you call Mr. Harmon or Mr. Davis back? A It is interesting to note at that time, sir, that I was actually getting more done with the number of employes that I had left, and I decided to carry on that way.

* * * *

Q And so when you met with Mr. Tawney—who drew up this list of six employes, by the way? A I did.

Q You drew those up yourself? A Yes, sir.

Q Just from memory or what did you consult, if anything? A Well, sir, I actually—from memory in respects to what I thought at that particular time without [fol. 223] consulting any records as to who were the younger men.

Q I see, and so you went to the meeting with Mr. Tawney, or at least the meeting started with you of the opinion that Herbert Wills and Richardson should at least be two of the people who should go? A Yes, sir.

Q And what changed your mind about Mr. Richardson, if anything? A He was working in the warehouse.

Q Uh huh. A And he at that time he was doing a very good job, I was told by Mr. Tawney, as a warehouse helper in getting boards, dry wall materials, etc. delivered.

Q Uh huh, was he also one of the best warehouse employes you ever had? A Oh, no, sir, I wouldn't say that, but he was good, he was doing his job.

Q Did you ever have opportunity to view Mr. Richardson or did you just take Mr. Tawney's word for that? A Did I what, sir?

Q Did you just take Mr. Tawney's word that he was doing a good job? A I noticed how the boy was operating.

Q Then, why did you decide that Mr. Richardson should go of your own mind and then have it changed by what Mr. Tawney had told you? You had already taken that into consideration, did you not? A I think a manager is entitled to consulting with his superintendent.

Q Oh, yes, sir. I didn't say that. I just meant, you had already— A With respect to his employes.

Q But, you had already had your own mind made up prior to this meeting that Richardson was a good employe doing his job, yet you had decided of your own testimony that Richardson, being single, should go? A That's right, sir.

Q And Mr. Tawney comes in and he tells you he is doing a good job in the warehouse? A Yes, sir.

[fol. 224] Q You already knew that? A Yes, sir.

Q Mr. Tawney say he couldn't get along without this man in the warehouse? A He preferred to keep the gentleman.

Q What did he say with respect to Davis, preferred to let him go? A That was in the Ready-Mix Department where we really expected things to get slower and we decided that we'd be better off laying off in the Ready-Mix Department.

Q So, you picked two men out of the Ready-Mix Department and one out of another department? A Right.

* * * *

Q I say, with regard to the pay raise that you gave, when was that announced, sir, if you can recall? A I think I stuck that in the envelopes, not in the envelopes, I don't get envelopes, I passed it out in the form of an announcement, oh, when I, at the close of business, as well as I remember, on September the, September the 22nd, I believe it was.

Q September 22nd, sir? A Yes.

Q You passed out a piece of paper, is that how you did it, with the notice of the wage increase that there would be a wage increase? A That there would be a wage increase, yes, sir.

Q All right, sir. Now, are you sure of the dates, September 22nd? A I'm reasonably sure, yes, sir, I did.

Q All right, sir. Now, were the employees told how much they were going to get? A No, sir.

Q How did you announce that? A In their pay [fol. 225] check, the next pay check. I told them it would be effective October the 1st in this notice, that it would be effective in the payroll period of October the 1st.

Q All right, sir. A And that would have been starting September the 28th and the 29th.

Q All right, sir. A The 2nd and 3rd and 4th of October.

Q All right. A So, they actually saw what their increase was on Friday, October the 6th.

Q Well, didn't they know before that? A No, sir, I didn't tell them.

Q You never called them in and had a meeting with them individually to tell them how much they were going to get? A I had a meeting with two or three of the fellows.

Q Who was present at that meeting? Was this individual— A Mr. Burnup.

Q The president of the corporation, Mr. Russell Burnup? A The president of the corporation.

Q All right, sir, and you say you only talked to two or three? A Specifically, sir, I don't remember how many I talked to. I think there were more than three. I spoke to five of them, as well as I remember.

Q Were they individually called to your office, sir, or was this a group meeting with yourself and Mr. Burnup? A No, I met with the individuals.

Q All right, sir, and was it not true all the employees did not get the same amount in their— A That's correct, sir.

Q What was the scale, sir, as best you can recall? A What scale, sir?

Q Well, you say they didn't, was there a schedule of [fol. 226] amounts of service as to how much of a raise they were going to get? A. It was decided in respects to the service that these boys had given us, yes, sir, to a certain extent we took it.

Q What was the highest amount any employee was going to get? A 15 cents.

Q And what was the minimum amount of service before you would be entitled to 15 cents? A There was approximately—it was not particularly on the amount of service. It was considered on the basis of service and the method in which these individuals had cooperated.

Q In other words, if he was a good employee with a short amount of service, would he have gotten 15 cents? A Possibly.

Q Well, did you get a raise on that condition at all, sir, short-term? A Yes, sir, I did. I granted some of them 15 cents, some of them a dime, some of them a nickel.

* * * *

Q There was no scale at all? A No, sir, nobody got less than a nickel.

Q Did the majority of them only get a nickel? A No, it was divided up pretty well, sir.

Q In other words, about half of your—did all—did the whole 50 employees whom you have under your jurisdiction get a raise? A All of them?

Q Yes, sir, or were there some who didn't get anything? A I think there were a couple of exclusions that didn't get one.

* * * *

[fol. 227] Q Now, did all those employees at the Melborne plant get a raise? A As well as I can recollect, yes, sir.

* * * *

Q And to your recollection can you recall at all how many of your Melbourne employees got 15 cents?

* * * *

A I think there were seven, eight, I think. Of the drivers there were about nine who got 15 cents and I think there were four that got a dime.

Q And a nickel? A And the rest of them, as well as I remember, got a nickel.

Q How many would that be, the rest of them, there is 13 accounted for, how many would that be— A Well, that would be to the best of my recollection about six, sir.

Q About six? A Yes.

Q Is that all the employees you have that got raises, nine and 14 is 13? A No, sir, in the driver category.

* * * *

Q With regard to the threats that you have brought out, that were brought out on direct examination that you had heard about and upon which you concluded that Davis and Harmon were not entitled to reinstatement, was it just the threats of this one individual, sir, Mr. Lyle Pate, I think you identified him on your direct examination, or were there other threats in addition to those [fol. 228] to which Mr. Lyle Pate told Doyle Tawney about? A It wasn't a direct threat to Mr. Pate.

Q No, but to the plant? A It was a threat, as I understood it, it could have been directed at the entire plant and all of its employees.

Q Well, was this the, was this the only threat that you had in mind when you wrote the letter to Mr. Harmon and Mr. Davis? A It's the only threat that I had in mind, yes, sir.

Q And to date you have no other threats? A No, sir.

* * * *

REDIRECT EXAMINATION

Q (By Mr. Muller) Mr. Moritz, does Mr. Doyle Tawney bring you reports on the production or abilities of your workers? A Yes, sir.

Q Does the dispatcher give you information on the abilities or characteristics of your workers? A Yes, sir.

Q Do your mechanics bring you reports on the care of equipment? A Yes, sir.

Q That the drivers give it? A Yes, sir.

Q Those are your sources of information? A Yes, sir.

Q You, yourself—let me ask you this, do you, yourself, also observe your employees as they work? A Yes, sir.

* * * *

Q All right. Now, based on information from your dispatcher, from Doyle Tawney, and from the mechanic and from your observation as manager of this company; [fol. 229] what was your opinion on or about September 29th as to the workability of Harmon, McKnight, and Davis relative to other employees? A They were not that cooperative.

* * * *

CONTINUED REDIRECT EXAMINATION

Q (By Mr. Muller) Specifically, what work was Mr. McKnight doing at the time of his layoff?

MR. MORAN: Which one, Mr. Muller?

MR. MULLER: The first was a layoff, the second was a discharge.

MR. MORAN: I'm sorry.

A He was a sand truck driver; he was engaged in my Sand Department, driving a truck in the Sand Department.

Q What type of work was that, specifically? A A That meant taking sand orders from, from the sand plant, from the bins, Eau Gallie sand plant, to the various job sites that requested sand orders.

Q All right. After McKnight was laid off did anyone else take over that duty, that work?

* * * *

[fol. 230] MR. MULLER: May he answer that question, Mr. Trial Examiner?

TRIAL EXAMINER: Yes.

Q Go ahead. A No, sir.

Q Why not? A I turned that particular chore over to a sand company.

* * * *

(Record read: "A All right. Now, when you were considering individuals to lay off, was that situation considered?")

A Yes, it was.

Q In what regard? A Turning the sand orders over to the sand company meant that it would eliminate the expense of that department, the department's handling of cement, of sand. The Sand Department in particular was not a profitable thing, it was more an accommodation to the customers than anything else.

* * * * *

RECROSS-EXAMINATION

Q (By Mr. Moran) Had Mr. McKnight ever done any other type work while he was with you during his first term of employment other than driving a sand truck, sir? A I don't recall.

Q You don't recall? A I don't recall.

Q But, you do recall he drove a sand truck? How do you recall that so vividly? A Because that was his [fol. 231] specific chore. That's where he was specifically assigned.

Q And that's all you know, that he was specifically assigned to the sand truck? A To the sand truck, yes, sir.

Q You, yourself, never saw him doing anything else? A No, sir.

Q Ever see him work in the warehouse? A I have seen him around the warehouse.

Q I said, did you see him working around the warehouse? A Yes, sir.

Q What did you see him doing in the warehouse? A Taking orders from the dispatcher, delivering sand, for sand deliveries from the stockpile at the Melbourne yard.

Q So, he didn't just work exclusively delivering sand from Eau Gallie, then? A He delivered sand from both locations.

Q And he also worked out of the warehouse? A He took orders from the warehouse.

* * * *

Q Did you get reports at all that Davis was ever late for work or for a pour? A Yes, sir.

Q How many times have you gotten that report on Mr. Davis? A Several times.

Q When was the last time prior to his discharge? A The last time that I can remember was that we had a pour on, at, I believe it was Juneau's Homes, and he was asked to come in early but he didn't.

* * * * *

[fol. 232] Q So, some time in September you heard about Mr. Davis being late on a pour job in the morning, isn't that true? A Yes, sir.

Q All right, sir. Who gave you that report? A That was given to me by Andy Minor.

Q And his job is a dispatcher? A Dispatcher.

Q All right, sir. Had you gotten any other reports prior to Mr. Davis leaving your employ that he had not been on time for a particular— A It wasn't the first time.

Q Well, then, you had gotten other reports? A Oh, yes.

Q Was this the last time prior to his discharge, this one you have just described? Was that the last one you had heard about? A Yes, sir.

Q All right. When was the time previous to that that you heard about it? A Some time during the month of September.

Q There were two in September? A As well as I remember, yes, sir.

Q All right. Who reported the second one? A Andy Minor, the dispatcher.

Q So, there are at least two that Mr. Minor reported to you? A That's right, sir.

Q Well, which one, were they one day after another, or what? A I don't recall how they fell.

Q All you recall is Davis was late and Minor told you about it? A That's right, sir.

Q All right, sir. Was there any other time? A Those are the two specific instances that I remember that came to my attention that he was late.

Q Those are the only two? A As well as I remember, yes, sir.

[fol. 233] Q All right, sir. Now, Mr. Davis was not the only one that had been late on jobs like this? A No, sir.

Q So, this was not an unusual thing so far as you are concerned, you were getting reports on other drivers? A It's unusual but not the only one.

Q I thought you said before this happened rather frequently? A I don't remember saying that.

Q If you did say it, what is your answer now? Did it happen frequently? A No, sir.

Q How often would it happen, sir, say per month? A Several times.

Q Several times a month? A Several times, yes.

Q All right, sir. Now, with regard to Mr. Harmon, did you receive the same type of information with regard to Mr. Harmon? A What type of information?

Q That he had been late for pour jobs? A I don't remember getting that kind of information on Mr. Harmon.

Q All right, sir. Did you ever receive any reports at all with regard to Mr. Harmon and his work ability as to them being bad? A Yes, sir.

Q All right, sir. He left your employ on September 29th. Now, prior to that time what type of reports had you received with regard to Mr. Harmon? A Mr. Harmon didn't cooperate in the yard as he should with his, in the Ready-Mix Department.

Q All right, sir. Who gave you that report? A This was reported by Mr. Doyle Tawney and certainly by my own observation.

* * * *

[fol. 234] Q Doyle Tawney, and he gave you a report on Mr. Harmon that he had been not doing what, proper work in the Ready-Mix Department? A Loafing.

Q He gave you a report that he had been loafing? A Yes, sir.

Q All right, sir. When did that occur to the best of your recollection? A It would happen from time to time.

Q Well, when was the last time prior to his discharge? A Exactly when I don't remember.

Q Well, to the best of your recollection today was it a week prior to his discharge or a month or what? A The last time it was talked about was on the 24th of September, or the 25th.

Q That was when you and Mr. Tawney were meeting, deciding who were to go? A Yes, sir.

* * * *

Q How often does Mr. Tawney come in contact or did he come in contact with Mr. McKnight, if you know, during the day? A I would say that Mr. Tawney saw Mr. McKnight at least once or twice a day.

* * * *

Q And what else did he tell you about Mr. McKnight? A Loafing.

Q He was loafing too? A Yes.

Q How many times did he make that report? A Several times.

[fol. 235] Q Did you tell Mr. Tawney to speak to McKnight about it, too? A Yes.

* * * *

Q Doesn't the company keep any personnel files at all on individuals that are employed? I don't know whether they do or not, dates of employment? A Dates of employment, we keep that.

Q But, you don't have any file for keeping either recommendations for raises, or anything like that? A No, sir.

Q All right, sir. Now, when was the last time, or when was any time, if you can give us in or about a date when you heard from Mr. Doyle Tawney that McKnight was loafing? A It was a general thing, any time between, the date of his discharge.

Q And the date of his discharge, how many times would you say you had gotten that report, sir? A Several.

Q What do you mean "several"? That could be more than three? A Two, three, four times.

TRIAL EXAMINER: Did Tawney name McKnight?
THE WITNESS: Yes, sir.
TRIAL EXAMINER: Or did he just report in general on the employe?
[fol. 236] THE WITNESS: No, sir, he named the employees.

Q What other employees did you get reports on they were loafing other than Davis, Harmon and McKnight? I don't know, did you ever get a report that Davis was loafing, too? A Oh, yes.

Q You got that report? A Yes.

Q Who gave you that report? A Doyle.

Q Doyle Tawney gave you that report? A Yes.

Q Now, you have got reports on at least three employees they were loafing some times during the period of their employment and some time prior to their date of discharge. What other employees did Mr. Tawney report on? A Bill Washington.

Q All right, sir, go ahead. A O'Keefe.

Q O'Keefe? A Yes, sir.

Q Go ahead, sir, anybody else? A Yes, sir, there were others. I wish I could think of their names right at this moment but I find myself not being able to say so, but I think they will come to me as we go along.

* * * *

Q You can't be explicit as to whether there were younger employees in your group? A There were younger employees in the group, yes.

Q Did you ever get reports on them that they are loafing, the younger employees? A No, sir, I didn't.

Q All right, sir. Then, I ask you why, when it came time to making the decision, before you talked to Tawney as to who was to be laid off, you had already had these reports, why didn't you, yourself, pick, if Davis, Harmon [fol. 237] and McKnight were to go—you have said that you got more reports on them than anybody else. Why did you want to let Richardson go first? A He was for consideration, he was one of the younger group of employees.

Q Didn't you testify yesterday that Richardson was one of your choices to go? A He was one of those considered.

Q When you came to the meeting with Mr. Tawney the day that you and he started meeting as to who was to go, wasn't Richardson your first choice to go? A He was considered.

Q You did no, of your own opinion, then, at that moment, decide that Richardson, you thought Richardson should go, before you talked to Tawney? A No, I didn't consider Mr. Richardson should go. He was considered as one of the group.

* * * *

Q Tawney didn't say anything to you that he wanted Richardson to stay and you changed your mind? A No, sir, we discussed it in this way, I said what about Richardson in the warehouse, he's one of the younger men in the group, and he said, "Well, now, in the warehouse he's one of your employes there that's, belongs to a team. He's qualified to do the job that he's doing and he's doing a good job. I don't think we should break up the team," and with that recommendation in mind and because of the business we expected in the warehouse there was no reason in the world to break up that team and further consider Mr. Richardson to be laid off.

Q All right. How about Mr. Wills, had you made a [fol. 238] decision as to him, at least, in your own mind made a decision that Mr. Wills was to go? A I suggested that Mr. Wills—

Q Had you gotten any bad reports on Mr. Wills? A No, sir.

Q All right, go ahead. A But, he was one of the younger group.

Q Had seniority ever entered into the conversation before on another layoff? A Not necessarily, it still isn't.

Q Well, then, why did you decide that Wills should go and you had all the bad records on Davis, McKnight, and Harmon? A I had to consider a group and certainly I was going to consider the youngest group in my employment.

Q Why, because seniority never had played a part in consideration before, why should it now? A It is still not seniority.

Q Not strictly? A That's right, sir.

* * * *

Q It's your testimony. So, now from the period they began employment to the time they were terminated you have been getting reports. Would you say more so on Davis, McKnight and Harmon than anybody else down there? A To be fair to them, yes.

Q All right, but when this election for layoff came and you were trying to save the company money, you didn't first think of Davis, Harmon and McKnight to go? A They were considered in the group of the youngest employees.

* * * *

[fol. 239] DOYLE TAWNEY a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Muller) State your name, please. A Doyle Tawney.

Q And what is your business or occupation? A General Superintendent, Burnup and Sims.

Q That's in the Melbourne operation? A Yes, sir.

Q Okay. I show you what I have marked as Respondent's Exhibit 8 for identification and ask if you have ever seen it before? A Yes, sir.

Q When? A An hour-and-a-half ago.

Q Where did you get it? A One of the employees handed it to me.

MR. MULLER: Mr. Trial Examiner, I will move to admit Respondent's Exhibit 8 which purports to be a letter from the union using this hearing for propaganda purposes in the election.

* * * *

TRIAL EXAMINER: All right, the document is rejected. You want it in the rejected folder?
[fol. 240] MR. MULLER: Yes, sir.
TRIAL EXAMINER: Mr. Reporter, please put is in the rejected folder.

Q Now, Mr. Tawney, do you know John McKnight? A Yes, sir.

Q Do you know Robert Davis? A Yes, sir.

Q John Harmon? A Yes, sir.

Q Were you present when John McKnight and Robert Davis were laid off? A Yes, sir.

* * * *

Q All right, what was said? A "Due to an increase in pay we are going to have to have a temporary layoff, due to business being down, due to an increase in pay, and I am giving you several days' extra pay to tide you over until you can find another job."

Q Who said that? A Mr. Moritz.

* * * *

Q All right. Would you keep your voice up, sir? Now, were you present when Joe Harmon was laid off? A Yes, sir.

Q Where did that take place? A It took place in Carl's office over at the Ready-Mix plant.

Q Who was present? A Carl Moritz, Joe Harmon, and myself.

Q As closely as you can remember, what was said, if [fol. 241] anything, by the parties present? A That due to a raise that was being given to the employees and that they would have to have a cutback, it was necessary that we lay off part of our employees.

Q All right, anything else that you can recall? A He asked it and when business picked up, or when the Cocoa plant opened if he could come back to work.

Q Who asked that? A Mr. Harmon.

Q All right, go ahead, just tell us what was said at this conversation, this talk? A And he was answered that when it picked up and when we needed more employees that they would be the first to be considered.

* * * *

Q Okay. Now, subsequent to the walkout of the employees, did you have any meetings with Mr. Moritz concerning any layoffs? A Subsequent to the walkout.

Q Yes, sir. After the walkout. A Yes, we did.

Q When was that? A On the Monday morning following.

Q All right, tell us about it. A Mr. Moritz said we were going to have to cut back three people, would you bring me a list of who you think should be considered.

Q This was what Mr. Moritz told you? A Yes.

Q All right, did you thereafter do that? A I thereafter brought him a list of six people that I thought should, that this cutback should be taken from.

Q What factors did you consider in making up this list of six people? A My own observation of the, what the people were producing for us, the length of time that they were, had been with us and their own production.

[fol. 242] Q I see, all right. After you presented this list to Mr. Moritz, did you all discuss it? A Yes, we did.

Q All right, in the discussions what factors did you and Mr. Moritz consider? A The main factors that we considered was how valuable these employees, those that were of the most value to us.

Q I see, all right. Specifically did you consider Herbert Wills? A Yes.

Q What was your consideration as to Herbert Wills? A I considered Herbert Wills one of our, the people that was producing for us, that was a more valuable employe.

* * * *

Q Specifically did you consider Basil Yeager? A Yes.

Q What were the factors considered on Basil Yeager? A I considered Basil as one to be let go at this time. Carl said no, Basil has got a lot of family, personal trouble, he owes money. He said, "Let's keep him on at this time," and besides at that time he was having some, he was a compensation case on these, with cement poisoning in his feet.

Q Specifically did you consider Mr. Richardson? A Yes.

Q What were your factors considered in Mr. Richardson's case? A Richardson was teamed up with another employee at the warehouse, all of our warehouse trucks have two employees on.

Q Uh-huh. A They were producing very well for us in dry wall deliveries.

[fol. 243] Q All right. Was Mr. Hensley on your list? A Yes, he was mentioned.

MR. KRUZICH: Excuse me, counsel, was that—

MR. MULLER: Hensley.

Q What were the factors considered concerning Mr. Hensley? A He, too, was in block delivery and was doing us a very good job in delivery of blocks. We, we have two block trucks where it's all hand unloading.

Q Hand unloading? A Yes, Hensley and Wills were the two men that were doing a very good job in that department.

Q I see, all right. Then, what were the factors considered by you and Mr. Moritz in finally narrowing it down to Davis, Harmon, and McKnight? A First, the departments that could, that we could take these people from that were causing us the least slowdown, my observation on the yard of the people that we could let go without hurting our operation.

Q I see. Was the quality of their work considered? A Yes, sir.

Q To what extent? A To the extent of how much work they were turning out for us, how much time after they came back into the yard that it took them to find something else to do.

* * * *

[fol. 244] Q All right. Now, I will direct our attention to on or about October 13th of this year and ask whether or not you had a conversation on that date with Lyle Pate? A Yes, sir.

Q Where did this conversation take place? A In the shop area.

Q Who was present? A Lyle Pate and myself.

Q Just the two of you? A Yes, sir.

* * * *

TRIAL EXAMINER: Tell us what Pate said.

Q Just what Pate said. A That Pate came to me and said—

Q Quote. A I can't use the word "they" because that was the word—

MR. MORAN: If they said the word "they" use "they."

A That they had threatened to blow up the silos.

Q All right, what did you say, if anything? A I said to him, "Well, now, who do you mean by 'they'?" He, in turn, said Davis and Harmon. I said, "Are you sure of who you're talking about, of the people?" and he said, "Yes, sir," he says. "I am."

Q Anything else that you can recall? A No, not at that time.

Q All right. What, if anything, did you do then? A I then got in touch with Mr. Moritz.

Q And what did you do? A Mr. Motitz' statement was, "Well, now, we have really got trouble."

[fol. 245] Q Thereafter to your knowledge was anything done by the company to attempt to verify or substantiate this information from Pate? A Yes, sir.

Q What? A I brought Mr. Pate into the office in the presence of myself, Carl Moritz, and you; we took this statement down in writing.

Q I see. About how long after this was the statement—strike that. How long after your initial conversation with Pate was the statement taken, approximately? A Approximately two days.

Q All right. What, if anything, did you do in relation to that statement? A I took Pate and had it notarized? A Yes, sir.

Q Did you see him sign it? A Yes, sir.

Q I show you what I have marked as Respondent's Exhibit 7 for identification, and ask you to look at it and ask you whether or not that is the statement which was taken and notarized?

MR. MORAN: I object to the witness looking at it at all, your Honor I don't see where the materiality of this is.

Counsel has gone through this, you have overruled the objection to this line to which I have a standing objection but I don't see why the witness is being offered here to prove a statement that was given by somebody else in which he happened to be present. I still don't know the purpose for which Mr. Muller is offering it or attempting to offer it or at least identify it through this witness, and I again ask that counsel be asked why and the purpose for such examination at this time.

[fol. 246] MR. MULLER: Mr. Trial Examiner, not for the Trial Examiner's edification but for General Counsel's edification the Employer's position is that information came to the Employer that two employees on layoff threatened to blow up certain equipment if they didn't get their jobs back and if the union didn't win the election. That information came to the Employer's representatives. The Employer's representatives attempted to authenticate this information, investigate that information. In doing so they took under oath a statement from the source of this information, Mr. Lyle Pate. The exhibit, Respondent Exhibit 7, is a sworn statement and upon this sworn statement, which I believe is dated October 25th, the Employer terminated the employment of its two laid-off employees, which ties in clearly with Respondent's Exhibits 1 and 2, the letters to Davis and Harmon advising them of the Employer's conduct. Now, that is the purpose of this exhibit.

TRIAL EXAMINER: I thought it was.

MR. MORAN: I will object on the grounds, if—I take it, and if counsel will correct me if I'm wrong, I take it the Employer is offering this merely to show that the Employer had a basis upon which he concluded that some misconduct to his knowledge had taken place and been committed to the best of his knowledge by these employees, or by—

MR. MULLER: That's right, we do not offer this affidavit—

[fol. 247] MR. MORAN: For the truth?

MR. MULLER: For the truth or falsity of the allegations therein.

* * * *

TRIAL EXAMINER: Well, I think from Mr. Moritz' testimony that he did have the document before him at the time and based on this document he took certain action. You objected to the document yesterday because there wasn't any proof it was Pate's signature on it.

MR. MORAN: That's right.

TRIAL EXAMINER: Now, this witness is here to testify he saw Pate sign it.

* * * *

VOIR DIRE EXAMINATION

Q (By Mr. Muller) . . .

* * * *

Q Did you read it over before or after Mr. Pate signed it? A After.

[fol. 248] Q Mr. Pate signed it and then for the first time you read it? A Yes, sir.

* * * *

TRIAL EXAMINER: And you went over with Mr. Pate to the Notary to get it signed?

THE WITNESS: Yes, sir.

Q Who held the statement in their possession when you went over to the Notary with Mr. Pate? A I had it in my possession while we went over.

Q May I see it for just a moment? I ask you, whose signature is that and let the record indicate I am showing him a signature above an inked-in line on Respondent's Exhibit No. 7.

MR. MULLER: Yes.

A That's Lyle Pate's signature.

Q All right, sir, whose signature is that down there? A That's Lyle Pate's signature.

Q Did he sign it twice that day, sir? A Yes, sir.

Q When did he sign it the first time? A After it was taken down, after it was wrote the first time.

Q Has it been written the second time? A No, when we went down to the, to have it notarized, he signed it again in front of the Notary.

* * * *

[fol. 249] TRIAL EXAMINER: The document is received.

MR. MULLER: Respondent's Exhibit 7.

(Thereupon, the instrument above referred to was received in Respondent's Exhibit No. 7.)

* * * *

CROSS-EXAMINATION

Q (By Mr. Moran) . . .

* * * *

Q How many departments do you have, say, in Melbourne, are they broken up department-wise? A Yes.

Q All right, sir, what departments are there in Melbourne? A We have block.

Q Block Department? A Ready-Mix.

Q Ready-Mix? A Warehouse.

Q Warehouse, you also have a garage down there, sir? A Yes, sir.

Q Is that under one of these departments? A Yes.

Q Which department is the garage under in your administrative setup, or is this a separate department, is the garage a separate department? A The garage is a separated department, yes.

* * * *

[fol. 250] Q You never told Mr. Pate to come up here to the hearing or that he was going to be called as a witness? A No, I had no way of knowing.

Q So, to your knowledge if Mr. Pate were here this morning you have no idea how he got here? A This morning, yes, sir.

Q How did he get here, sir? A He came with me.

Q Were any arrangements made by you to bring Mr. Pate to this hearing? A This morning?

Q Yes, sir. A Certainly.

* * * *

Q All right, sir. Was Mr. Pate here yesterday? A Yes, sir.

Q Did you bring him here yesterday? A No, sir—now, wait a minute, I had several people in the car, let me check back. Yes, Mr. Pate did come with me yesterday.

* * * *

Q All right, sir. Now, it's your testimony you were present when John McKnight and Davis were laid off? A Yes, sir.

* * * *

Q I any you if the Sand Department administratively is a part of the Block Department. It's either yes or no. A No.

Q What department is the Sand Department attached to? A Of its own.

* * * *

[fol. 251] Q I will ask you, then, what did Mr. Moritz tell you at five o'clock that night? A That we had, said that the three people, that he wanted to see them before quitting time that night.

Q All right, sir, and did he name them? A Yes, sir.

Q You already knew who it was that was going to be laid off, didn't you? A Yes.

Q But, he told you he wanted to sepcifically see Davis, McKnight and Harmon what, before they clocked out? A When they got in from the day's work.

* * * *

Q Now, to the best of your recollection could you tell us what occurred after you brought in the line of conversation? What occurred, if anything, after you brought Joe Harmon to Mr. Moritz' office? A Mr. Moritz told him the same thing that he told the other people, "Due to the increase in wages and due to the economic conditions that we had to cut back," that he was going to have to let him go.

Q All right. A Joe then asked, he said, well, he says, "When things pick up, when your Cocoa operations would be ready could I get my job back," and I, Mr. Moritz' answer to that was "Yes, when we pick up that you will be the first consideration for rehiring."

* * * *

[fol. 252] Q Did either Davis, Harmon, or McKnight say anything about they thought the layoff was a personal thing? A No, sir.

Q And you're sure of that? A Yes, sir.

Q Did any of these three employees raise any type of objection at all to the fact they were being chosen for layoff or ask why they were being chosen or did they all just accept it and walk out? A They accepted it, it was not asked why.

* * * *

Q All right, sir, and then the walkout occurred on a Thursday, about the 15th of September, and then the following Monday morning you had the layoff meeting, is that true? A Carl and I discussed—

Q The layoff A Yes, sir.

Q All right, sir, and would you, who initiated these talks? Was it you or was it Mr. Moritz? A Mr. Moritz.

Q All right, sir. He called you to his office, did he? A Yes, sir.

Q And what did he say to you and what did you say to him? A That he was going to grant a raise and that he would have to figure a way to cut back. Asked me to give him a list of the people that I carried.

Q All right, sir. Did you get a list of the people to consider? A Yes, sir.

Q All right. Now, I want this conversation in the nearest you can recall of the exact words, if you would, please, what else was said? A That he had been authorized from West Palm Beach to grant this raise and that their request of him was that there would have to be [fol. 253] a cutback in order to take care of the raise. He then asked me to get him a list of the people that we could consider for a layoff at this time.

Q Did you have any comments? A I told him I would get them.

Q Well, you were in charge of production and you were operating with a group wherein you needed personnel. Did you raise any objection at all that you couldn't cut back? A No, sir.

Q You did not. Did you feel you were operating with excess personnel? A I—at this time we were at the

point of operating with excess personnel due to a slow-up in business, yes, sir.

Q All right, sir. So, I will ask you if you know, and you are in charge of the Ready-Mix truck drivers? A Yes, sir.

Q How many hours per week on an average were your Ready-Mix truck drivers putting in? A About 55, average.

Q On the average? A Yes, sir.

* * * *

Q Now, you had about eight truck drivers and they were averaging how many hours per week, sir, at this time? A At this time?

Q By "this time" I mean the time you are considering the layoff, that Monday morning following the walkout when you are having the meeting. A 55 hours.

Q How about your Sand Department drivers? How many hours were they averaging, sir? A Approximately the same.

Q Now, when you and Mr. Moritz were having this [fol. 254] meeting on Monday morning, sir, and he said he was going to grant a raise he had been authorized by, I think you said, West Palm Beach to give a raise— A Yes, sir.

Q Was this the first time you had heard that Mr. Moritz had been authorized to give a wage increase over the last, say, two months? A Yes, sir.

Q You had never heard about a prior authorization? A No, sir.

Q I show you Respondent's Exhibit No. 4 which is in evidence and ask you if you had ever been acquainted and I point your attention specifically to the third paragraph and ask you if you have ever been acquainted with that authorization? A No, sir.

Q Never been, Mr. Moritz had never told you that he had been authorized to grant a 5-cent increase? A No, sir.

Q All right, sir. Now, when he then announced on the Monday morning following the walkout that he had been authorized to grant a wage increase, did you ask him any-

thing? A I asked him what kind of an increase it would be.

Q All right, sir. What did he say to you? A He said that that would be determined according, would be determined by him and he would let me know.

Q Did he tell you how West Palm Beach had authorized it or how much West Paul Beach had authorized for a maximum? A No, sir.

Q Did you ask him? A No, sir.

Q Did you ask him why he had to cut back or did he tell you why he had to cut back? A He told me why he had to cut back.

[fol. 255] Q You didn't ask him? A No, he told me, that's what he called me in for.

Q All right, sir, and then he asked you to draw up a list? A Yes, sir.

Q And what did he say about the list as best you can recall, the nearest words that you can recall today that he said to you? A After I give him the list?

Q No, no, while he's telling you to give him the list what did he say to you about drawing up the list? A Get a list of people that you consider that we should select these people to be laid off from.

* * * *

Q He didn't say to you, you correct me if I'm wrong, "We are going to have to lay off three people"? A At this particular time, no.

Q "Bring me a list of six people from which we can choose"? A Yes, sir.

Q What is yes, sir, which part did he say? A Bring me a list of six people that we can consider laying off.

* * * *

Q Why did you go and pick out people in the Ready-Mix, Block Department, or Sand Department? Was something limited to that? Did Mr. Moritz tell you that that's where they were going to come from? A No, sir, I selected people first with the—I picked the youngest first.

Q Who were the youngest that you picked, sir? A The youngest?

[fol. 256] Q Yes, sir. A Well, there was Davis, McKnight, Harmon.

Q We know those three, Davis— A Wills.

Q McKnight, Harmon, Wills— A Richardson.

Q Richardson. Can you recall the other name? Was it Mr. Yeager? A Yeager.

* * * *

Q Does the Eau Gallie operation come under your control, or did it at that time? A No, sir.

* * * *

Q All right, sir, when did you compile this list? You had a meeting on Monday and this is the first time you find out there's going to be a layoff? A Yes.

* * * *

Q Now, so you have six names on a piece of paper and that's all, and if you would, would you tell us what Mr. Moritz said to you, if anything, prior to a discussion of the individuals who were named on that sheet?

Did you have any type of discussion at all? A The discussion was over the names on the paper.

* * * *

Q You discussed Wills first? A Carl brought up Wills.

[fol. 257] Q All right, sir. What did he say with regard to Wills? A He asked me what I thought about Wills. Well, Wills was my best block driver. I asked him, no, not to consider Wills.

Q Did Mr. Moritz say anything with regard to the fact that he thought Wills should go prior to the time that you told him about the capabilities of Mr. Wills? A Carl suggested that Wills, because he apparently was probably the first name that I listed on the paper.

* * * *

Q So, Mr. Moritz said—what did he say with regard to Wills? A He says, "Doyle, what about Wills?" I answered, "He's my better block driver, I would rather not consider him for layoff at this time."

* * * *

Q All right, sir. Any more conversation about Wills? A No, that settled Wills for the time being.

Q For the time being. There's been no final decision, Mr. Moritz say okay? A There's been no final decision at this time, the first time through the names there was nothing final, it was a discussion.

* * * *

A We had, went on to the next one.

Q Who was that one? A Yeager; I suggested we let Yeager go. Carl said we should keep him because he owes [fol. 258] money, because of the fact that he was a compensation case with his feet at the time and he decided that we better hold him.

* * * *

Q Yes, you had suggested he be let go and I wanted to find out what your opinion was. A Just too much absenteeism. I mean—

Q Did you convey this information to Mr. Moritz as to why you wanted Yeager to go? A Yes, sir.

Q And he in reply thought you should keep him because he owed money? A And due to the compensation case, he was, had cement poisoning in his feet at the time.

* * * *

Q All right, sir. Who was the next man? A Richardson.

Q Richardson, all right. A He was working in the warehouse.

Q Well, what was the discussion?

* * * *

A I said he was working in the warehouse with the partner, they are teamed up good, they are delivering dry wall, let's let that combination alone.

* * * *

[fol. 259] Q In other words, he never left you with the impression that he thought Richardson should go? A No, not—

Q You say not at that time or what? A At that time. Now, this is a general discussion of everyone at

this time. No decision has been made, we passed over to, but no decision.

* * * *

Q All right. The next man? A Davis.

Q Davis? What was said about Mr. Davis? A Well, that he was one of the younger men, and—

Q Who said that? . A I said that.

Q All right, sir. A And that in my observation of the yard that it took him longer to find something to do when he returned to the yard without concrete to haul than it should.

* * * *

Q Okay. What did Mr. Moritz reply to that, if anything? A He agreed that that was true. This is all for consideration.

* * * *

Q Well, this is only about three days after—I'm sorry, it was about a week or so after the walkout you were having this discussion, is that true? A Yes.

* * * *

[fol. 260] Q The next man you discussed? A McKnight.

Q All right, what did you say about him and what did Mr. Moritz say about him? A Well, I said that McKnight comes into the yard, I can go to the dispatch office and look out at any time through the day and I'll see McKnight standing in the coke room, and I have made comment to McKnight many a time about—

TRIAL EXAMINER: Wait a minute, is this what you told Mr. Moritz?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: All right.

* * * *

Q You saw him standing in the coke room and what else? A That any time throughout the day I can go to the dispatch window and find him standing in this coke room. He delivers a load of sand, comes back and that's where he ends up.

* * * *

Q We haven't gotten to Harmon, yet. A Harmon, all right.

Q He was the last one you discussed, right? A He [fol. 261] was the last one we discussed.

Q All right, sir. What did you say about Harmon and what did Mr. Moritz say about Harmon? A Well, that Harmon could come into the garage and it would take him forever to come on up front or to pick up another job that everyone in the yard knew, knows what they needed to do when they, their truck was down or there was no Ready-Mix to deliver.

* * * *

Q Well, now, you have gone through the list of six people, sir? A Yes, sir.

Q How did the meeting terminate, if it did? Did you continue on discussing anything else or did the meeting break up? A No, I left at that time. Carl told me he will let me know.

* * * *

Q Between Tuesday and Friday you didn't know who was going to go? A Specifically, no.

* * * *

Q All right. Then, it was at that time on Friday when he called you for the first time you found out who was going to go? A That who definitely was going to go, yes, sir.

* * * *

[fol. 262] Q All right, sir, but you had no further conversations with Mr. Moritz, you didn't take part in the final decision, though? Mr. Moritz made that by himself, sir? A The final decision, yes, sir. I merely gave the recommendations.

* * * *

Q (By Mr. Moran) All right, sir, now let's go back to the meeting you had with Mr. Moritz when you brought up the list of six names and then a conversation ensued with Mr. Moritz which you gave your feelings who should be, as to who should be laid off, is that right? A Yes, sir.

Q And the six names that you gave Mr. Moritz who could possibly be spared were the ones that you have testified about, is that right? A Yes, sir.

Q We went down there individually. I believe you said on direct examination that you also discussed an employee by the name of Hensley? A Yes, sir, we—

Q His name was not on that list, though? A His name was not on the list.

Q Would you please tell us why the name of Mr. Hensley was discussed, if you know? A He was brought up as a new, fairly new employe.

Q I see. A My comment was, he's doing a good job in block.

Q Who brought his name up, sir? Was it yourself or Mr. Moritz? A I brought it up myself.

Q You did? A Yes, sir.

[fol. 263] Q Why had you not included Mr. Hensley's name among the original six? A No reason.

* * * * *

Q Well, how did you reach six names? Was Mr. Hensley not among—he is certainly, if you can agree to this, was he less in seniority than Davis? A Yes.

Q Was he less in point of service so far as McKnight? A Yes, sir.

Q And Harmon? A Yes.

Q Wills? A Very close on those two.

Q All right. Yeager? A Approximately the same time on Yeager.

Q So, Yeager, Wills and Hensley would have been hired in or around the same time? A In or around, yes, sir.

* * * * *

Q All right, sir. Why did you mention Mr. Hensley's name during the discussion since you were asked to give a list of six and you gave a list of six? Why did you volunteer a seventh name to Mr. Moritz? A Because of the dates they were hired, because of the less seniority—

* * * * *

Q With respect to seniority, were not Davis, Harmon and McKnight the most senior of that group of six names

[fol. 264] in the point of seniority, seven names? We'll include Hensley. A Well, they are all within a matter of days or weeks of each other.

* * * *

Q Well, what was your recommendation as to Hensley, if you made one, sir? A That he was doing a very good job where he was. We needed him in block deliveries.

Q You needed him in block deliveries? Did Mr. McKnight ever drive a block truck? A Yes, sir.

* * * *

A Mr. Pate came to me the morning of, we'll say, the 22nd, I'm not sure of the date.

Q It was on or about that date? A On or about.

Q All right, sir. A With the information that two people had called on him during the night.

Q Yes, sir. A And during the course of the conversation they made the statement that if they didn't get their jobs back, if the union didn't get in, it would be fixed so no one could work.

Q It would be fixed so no one could work? A By using dynamite on the silos, the storage silos.

Q It will be fixed so no one can work by fixing dynamite, did you say? A By using dynamite.

Q By using dynamite on the silos? A Well, he called them stacks. Actually, they are silos.

Q That's what I want. They would use dynamite on the stacks? A On the stacks.

[fol. 265] Q If they didn't get their jobs back or the union didn't win the election? A Yes, sir.

Q All right, sir. Now, where did this conversation take place? A In the shop.

Q Do you remember an approximate time? Was it in morning or afternoon? A It was in the morning that, between nine and ten o'clock.

Q Did he tell you when such a remark had been made to him? A The night before.

* * * *

Q As near as you can best recollect today, what were the words that Mr. Pate said to you in describing the

individuals who said this to him, what did he say to you? A He said to me that "Two people called on me during the night."

Q Yes, sir. A "Called me outside," he lives in a trailer, "called me outside," and he went out to the, apparently there's a fence between, around his trailer.

Q All right, sir. A And talked to them in the dark.

Q Uh huh. All right, sir, and then you said to him "Who?" A Yes.

Q All right, sir. Now, I want as near as you can recall what McKnight, or what Pate replied to you in answer to your question "Who?" A I asked him to, when he didn't name right off, I asked him to describe the people to me.

Q In other words, you asked who and was there silence on his part for a few minutes? A Yes.

Q All right, sir. A Then he—

Q Then you asked him to describe them? A Yes.

[fol. 266] Q What was his reply in answer to your statement of "describe them"? A Well, he described that as the one who worked back in the shop cleaning out a mixer at one time.

Q One of them— A And I asked him, "Well, which one"? Well, he says, "Davis."

Q All right, sir. A And who the other one was, and he said, "Well, it's the one that worked back here cleaning out a mixer," that when we were using dynamite on it, and I says, and he then named Joe Harmon.

* * * *

Q All right, sir. Now, you have him naming at least one of the individuals, Davis? A Yes.

Q What did you say, if anything, or what did he say next? A Then I wanted to know who the other was because there was two people.

Q I'm not interested in what you wanted to know, what did you say to Mr. Pate and what did he say to you? He has now named Davis. What did you say to him, if anything? A I asked Mr. Pate who was the other?

Q Who was the other, and he said, if anything, in reply— A It was the man that was helping back here on the, cleaning out the mixer with the dynamite.

Q It was the man who was helping, and, I'm sorry, I didn't get the rest of it? He was helping what? A Cleaning out the mixer with the dynamite.

• • • • •

[fol. 267] Q He said Harmon. All right, sir, anything else? Did he say anything else or did you? A No, I then went to Carl with the information.

• • • • •

Q Did you know that Mr. Harmon was capable of doing such work? A No, I did not.

Q You did not know at that time? A I watched him set the first charge.

Q Did you show him how to do it? A No, I watched him set the first charge.

• • • • •

Q Did you ever ask Mr. Harmon during your, I'm sorry, did you ever ask Mr. Pate who it was who made this threat, who uttered it? Did you ever say anything to him about that, which one of the two individuals said that? A His testimony, or his statement was that Joe Harmon is the one that made the statement of the threat of the dynamite in the stack, as he calls it.

• • • • •

Q Well, when did you ask Mr. Harmon for the first time, or, I'm sorry, Mr. Pate for the first time, if you ever did, who made the remark? A When we took the written statement.

Q Up to that time you just knew that two names were involved and had been to visit Mr. Pate and somebody [fol. 268] had made that remark among those two men? A Yes, sir.

• • • • •

Q All right, sir. What did you say to Mr. Moritz? A Told him that we'd been threatened with dynamite on the silos, and I at that time named the two people.

• • • • •

Q All right. What did Mr. Moritz say to this, sir, when you delivered the words of the threat and—did you tell him to whom the threat had been delivered? A Yes, sir.

Q You told him it was Mr. Lyle Pate, and you told him who had delivered the threat. What did he say to you, if anything? A His comment was "We have really got trouble."

* * * *

Q And when was the next time, if ever, that you talked to Mr. Pate about this incident, sir? A The next time it was brought up is when Mr. Muller asked me to bring Mr. Pate into the office.

Q All right, sir. The date, how many days later was that, sir? A About two days later.

Q In other words, the affidavit was given on October 25th, which is that statement you took into the Notary. So, that was dated on October 25th so the time you would [fol. 269] have heard about the threat to the plant was on or about October 23rd, is that true? A That would be about right, yes, sir.

* * * *

Q All right, sir. Did Mr. Pate say to you that he didn't want you to tell anyone, that he was afraid or anything like that? A He was afraid when he came to me. He was, he showed that he was afraid, yes. In my opinion he was afraid.

* * * *

Q Upon what did you base that conclusion, sir? A On knowing Mr. Pate.

Q Do you know him very well, sir? A I know him as far as his work is concerned, yes, sir, very well.

Q What was different about his appearance on that day than normal observance that made you conclude that he was worried, he didn't state he was? A That, first of all he called me off to the side where there was no other people that could hear. Ordinarily he talks to me no matter who is around.

* * * *

Q In other words, approximately 11 days elapsed between the time you heard of it and the time you took him to a Notary and had him sign that statement? A Until it was taken down in writing it's possible it was 11 days.

Q It's possible, I'll ask you to look at the dates. Are [fol. 270] you still not positive as to when you talked to Pate? A I talked to Pate on or about the 13th or 14th.

Q All right, sir. A That has refreshed my memory as to when I talked to him.

Q All right, sir. So, you were wrong before when you said it took place on the 23rd? A I apparently was wrong, yes, sir.

Q You're sure you were wrong? A I'm sure I was wrong.

Q All right, sir. I ask you again now you have heard from Mr. Pate on or about October 13th or 14th. When did you go see Mr. Moritz? A The same day that I got the information that I passed the information onto Mr. Moritz.

* * * *

Q All right, sir. How did the meeting happen to occur on the morning of the 25th, or the afternoon, whenever it was? A Mr. Muller asked me to bring Pate in to get a sworn testimony if he would, to see if he would give a sworn testimony.

Q Whose office was this given in, sir? A In Mr. Moritz' office.

Q Were you and Mr. Moritz and Mr. Muller and Mr. Pate the only ones present? A Yes, sir.

Q Miss Burney was not there, Mrs. Burney? A No, sir.

Q Did you take any part in the decision as to Mr. McKnight coming back to work, sir? A It was brought to my attention. When I asked for more help, that I had [fol. 271] to have more help, that's when Carl told me "Well, let's get McKnight."

* * * *

Q All right, sir. When did you first become aware prior to that Friday when you had a meeting with Mr. Moritz that you were in need of more help? A As busi-

ness started to pick up, I would say three or four days before.

Q That's when you first started to become aware you were going to need more help? A Yes, sir.

* * * *

Q What did you tell Mr. Moritz about the, needing more help? A That we needed more help.

Q What did he say to you? A He asked me why, always asked me why.

Q All right, sir. A I told him that Ready-Mix is picking up, blocks are picking up, we are going to have to increase our staff to take care of business.

* * * *

Q All right, sir. Now, Mr. Moritz was the one who suggested McKnight, you did not? A Mr. Moritz suggested McKnight.

Q All right, sir. Did you make any comment that you didn't want McKnight, or anything like that? A I think my comment was that he is working, we had better check [fol. 272] with the man he is working for before we just go out and rehire him.

* * * *

Q Well, how soon before he was rehired did this meeting with Mr. McKnight take place wherein he stated he would like to come back to work for Barnup and Sims? A Approximately three weeks.

Q Approximately three weeks, and what was your reply to him, sir, at that time when he said—he said something about the fact he would like to come back to work for Barnup and Sims, he asked you if you had any job openings or what? A I told him at that time we were still down, that we hadn't, our business hadn't picked up to where we were hiring yet.

* * * *

Q All right, sir. Now, what did you say to Mr. McKnight the morning, or I don't know—what time of day was it you went out to see Mr. McKnight out here on the job? A About noon.

Q About noon, and he was working there? A Yes, sir.

Q All right, sir, what did you say to him? A I asked him if he still was, wanted to come back to work for Barnup and Sims. His answer was "Yes, sir."

* * * *

Q Did he report to you, sir, when he came to work? A Yes, sir.

[fol. 273] Q All right, sir. What did you tell Mr. McKnight at that time, if anything? A That I wanted him on the sand truck and that he would be back as everything was before his layoff.

* * * *

Q Did you tell him which truck to use? A Yes, sir.

Q What truck did you tell him to use? A The dump truck.

Q There are two of them, did you tell him which one of the two to use? A Yes, sir, the new dump truck.

* * * *

REDIRECT EXAMINATION

Q (By Mr. Muller) . . .

* * * *

Q If you know, what was the relative seniority between Herb Wills and Bob Davis? A They were very close together.

Q Do you know how close? A Possibly the same day.

* * * *

Q I believe you testified that Mr. Harmon got two increases following his original hire, is that right? A Yes, sir.

Q What were the bases of those increases? A The [fol. 274] first increase is automatic so it would be after 30 days, thereabouts, we gave, I've given a nickel increase. The second increase when he went from Block to Ready-Mix.

Q You mean he changed the type of equipment he was driving? A Changed the type of job he was doing, yes, sir.

* * * * *

RECROSS EXAMINATION

Q (By Mr. Moran) . . .

* * * * *

Q All right, sir. Now, you said with regard to Harmon that he had two increases following the date of his hire? A Yes, sir.

Q All right, sir, and you said there's an automatic raise after 30 days? A It is, I generally give a raise after 30 days.

Q It's not automatic, then? A It's automatic with me now, yes, sir.

Q Now it is, how about prior to September 29th? A It has always been automatic with me. If I'm going to keep a man after the 30-day period—

Q Yes, sir. A —that I gave a nickel raise after that 30 days?

Q All right, sir. Now, with regard to Davis did you [fol. 275] ever give him a raise after 30 days? A Exactly when he got a raise I don't remember.

* * * * *

Q All right, sir, before in your cross-examination you had said that we started on the point of Mr. Davis, that some time prior to the walkout a week or two before, I think you said, he had asked you for a raise and that he had done so on numerous occasions, you recall that? A Yes, sir.

Q All right, sir, and I think it was your recollection that approximately a week or two prior to the walkout he had asked you for a raise? A Yes, sir.

Q Was there anyone else present when he asked you that question? A I don't know.

Q There could have been? A Could have been.

Q All right, sir, but anyway you do recall Mr. Davis asking you for a raise? A Yes, sir.

Q Did he mention an amount? A No.

Q All right, sir, and what was your reply to him, if any? A That I would look into it.

Q All right, sir, and did you look into it? A Yes, sir.

Q Did you give him a raise? A I don't remember whether I gave him a raise at that time or not.

Q You could have? A I could have.

* * * *

Q Well, is there any situation wherein you can recall that you did not go the other nickel? Take your block truck drivers on or about September 29th, I think you received, you only had about eight of those, Ready-Mix [fol. 276] drivers, I'm sorry, Ready-Mix drivers. Do you recall for people who had worked there a period of at least 30 days among those eight, I don't know how many there were but I would think perhaps all eight of them had worked at least 30 days, do you recall anyone for whom you had not given a nickel raise? A No, I don't recall anyone.

Q And to the best of your recollection here today, would you be willing to state that you had given them a raise of at least a nickel since, if they were in your employ for in excess of 30 days? A I state that I gave Harmon a nickel raise. That one I remember.

Q All right, sir, and you may have given Davis one, you don't remember? A I may have given Davis one.

Q You don't have any recollection today that you did? A Not definite, no, sir.

Q How about McKnight, do you have any recollection as to whether you gave McKnight a raise? A Yes, I gave McKnight two raises, I believe.

Q And this was during his first term of employment? A Yes, sir.

Q Before the layoff? A Yes, sir.

* * * *

Q All right, sir. Now, on September 29th, 1961, you were told by Mr. Moritz, if I understand your testimony, to bring in McKnight and Davis when they returned, and Harmon, right? A Yes, sir.

* * * *

[fol. 277] Q When was the first time that evening that you saw McKnight or Davis? A They were in front of the office.

Q You had some out of your office? A Yes, sir.

Q And you did not know Davis and McKnight were yet in until you saw them? A That's right.

Q Have you ever to this date found out or do you know as of this date that McKnight and Harmon, McKnight and Davis, I'm sorry, were out together that evening aboard a Ready-Mix truck? A Since then I have heard that they were, yes, sir.

Q Did you find out who gave McKnight permission to go? A Permission was not given McKnight to go.

Q You're sure of that? A Yes, sir.

* * * *

YVONNE BURNEY

a witness called by and on behalf of Respondent, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Muller) . . .

* * * *

Q Now, I'll direct your attention to September 29th of this year and ask you whether or not you were present in that office during a conversation between Mr. Moritz [fol. 278] and Mr. Davis and McKnight? A Yes.

Q You were present? A Yes.

Q Who else was present other than Mr. Moritz, Davis, and McKnight, and yourself? A Doyle Tawney.

Q Doyle Tawney was there? A Yes.

Q All right. Mrs. Burney, just as closely as you can, recite, tell us what was said by the individuals present? A Mr. Moritz said "Fellows, we are going to have to let you go because of a, business is slow in your department and because of a wage increase." He said that if business did pick up to come back and see us, and he said that he was giving them a little extra money to help tide them over until they could get jobs. One of the boys mentioned something about seniority.

Q Do you remember who it was and— A No, I do not.

Q You don't know which one it was. A No, I do not.

Q All right. Do you recall specifically what he said about seniority at that time? A It was something to do with seniority didn't count, or something to that effect.

Q Seniority didn't what? A Didn't count, in other words, something like—

• • • •

[fol. 279]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S EXHIBIT No. 1

November 8, 1961

Robert Davis
819 King Richard Rd.
Eau Gallie, Fla.

Dear Robert:

When you were laid-off on September 29, 1961, it was with the understaning that business in your particular job was slow and that you would have "first call" on any job that came available once business picked up.

Business is now picking up, but I regret to advise you that I cannot re-employ you.

It has come to my attention that you made or condoned serious threats to damage property of the Company should the Union fail to win its election. Under such circumstances, I cannot re-employ you with our Company.

very truly yours,
Burnup & Sims Inc.,
Carl H. Moritz Mgr:

[fol. 280]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S EXHIBIT No. 2

November 8, 1961

Joseph Harmon
1000 Riverview Dr.
Melbourne, Fla.

Dear Joseph:

When you were laid-off on September 29, 1961, it was with the understanding that business in your particular job was slow and that you would have "first call" on any job that came available once business picked up.

Business is now picking up, but I regret to advise you that I cannot re-employ you.

It has come to my attention that you made or condened serious threats to damage property of the Company should the Union fail to win its election. Under such circumstances, I cannot re-employ you with our Company.

very truly yours,
Burnup & Sims Inc.
Carl H. Moritz Mgr:

[fol. 281]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S EXHIBIT No. 4

Russell J. Burnup. Pres.
Riley V. Sims, Vice-Pres.
Thelma Duff Eaton, Sec.-Treas.
1020 Eleventh Street
P. O. Box 2431

Communication Conduit
Buried & Submarine Cable
Railroad Pipe Crossings
West Palm Beach, Fla.
TE 2-1608 TE 2-1609

CALL BURNUP AND SIMS, INC.
Communication Builds our State
CONDUIT CONTRACTORS

September 13, 1961
Mr. Carl Moritz
c/o Burnup and Sims, Inc.
1550 North Road
Melbourne, Florida

Dear Carl:

Enjoyed your attendance at our quarterly foremen and managers meeting in West Palm Beach yesterday.

After the meeting we discussed the general problems of the Melbourne operation. We were pleased to learn that the employees are aware of a greater cooperative spirit. The appearance of your yard certainly bears this out.

A general raise in wages of .05¢ per hour for hourly [fol. 282] paid employees was discussed, and we are herewith pleased to advise this to be an excellent consideration and suggest you make the increase effective on the October 1st payroll.

We will give further consideration to the increase of the other benefits discussed.

Very truly yours,

(Signed) By: RUSSELL J. BURNUP
Russell J. Burnup
President

[fol. 283]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S EXHIBIT No. 5

Russell J. Burnup, Pres.
Riley V. Sims, Vice-Pres.
Thelma Duff Eaton, Sec.-Treas.
1020 Eleventh Street
P. O. Box 2431

Communication Conduit
Buried & Submarine Cable
Gas Distribution Systems
Railroad Pipe Crossings
West Palm Beach, Fla.
TE 2-1608 TE 2-1609

CALL BURNUP AND SIMS INC.
Communication Builds our State

CONDUIT CONTRACTORS

September 22, 1961
Mr. Carl Moritz
c/o Burnup and Sims, Inc.
1550 North Road
Melbourne, Florida

Dear Carl:

Certainly was surprised and somewhat concerned by the report of the incident this A.M., that your drivers had staged a mass walk-out.

It is our understanding that they have requested a general increases of .15¢ per hour for all drivers. We feel this demand is exorbitant, but if necessary, we believe it advisable that you use your own discretion in regard to the matter.

[fol. 284] May we also call your attention to the fact that under such circumstances your operation will not be subject to making the necessary profit, and as a result it will probably be necessary that you give consideration to the cutting down of manpower.

Please make it clearly understood among the employees that a wage increase merits an improvement in cooper-

ation on their part. Actually, we do not feel that you should authorize a general overall .15¢ per hour wage increase as all employees do not have the same qualifiications and capabilities. However, as you are on the ground floor, and are fully familiar with all phases of this matter, we will leave it to your discretion.

Very truly yours,

(Signed) By: RUSSELL J. BURNUP
Russell J. Burnup
President

[fol. 285]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S EXHIBIT No. 7

State of Florida
County of Brevard

I, Lyle Pate, having been first duly sworn, depose and say:

I am employed by Burnup & Sims in Melbourne as lubrication man in the garage.

On about October 13, 1961, two men that used to work here came to my house about 12 midnight. (*) The men's names are Bob Davis and Joe Harmon. They began hollering, calling my name from outside. I live in a trailer with a small room built on it.

I went outside and asked them (*) what they wanted. They said they wanted to talk to me about the union, and said they wanted me to sign a card. They told me almost every one had signed up, and they wanted me to sign, too. I told them I would have to think about it. They also talked about being laid off from Burnup & Sims. They said that the union was going to get them their jobs back.

Towards the end of the talk, Davis said: "If the union doesn't get in, we're going to use some dynamite to make sure that those who didn't vote for it won't work either; we'll blow the gravel bins over and make sure that no one works." Harmon was right there at that time, but didn't add anything to Davis' statement.

[fol. 286] I know personally that Joe Harmon knows how to use dynamite because he has helped blast out a truck that was full of set-up concrete. Davis was in the

* Word deleted. Initialed by L.P.

area when Harmon was doing the blasting, but I don't know whether Davis knows anything about it or not.

I have read the above statement and it has been read to me and it is true and correct.

(Signed) By: LYLE JUNIOR PATE
Lyle Junior Pate

Subscribed and sworn to before me this 25th day of October, 1961.

(Signed) By: HOWARD BERG, JR.
Notary Public
Notary Public, State of Florida at Large
My Commission Expires Aug. 16, 1962
Bonded by American Surety Co. of N.Y.

[fol. 287]

MINUTE ENTRY OF
ARGUMENT AND SUBMISSION.—May 8, 1963

(omitted in printing)

* * * *

[fol. 288]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20117

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

BURNUP AND SIMS, INC.,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, Sitting at Washington, D. C.

OPINION—August 22, 1963

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and DeVANE, District Judge.

JONES, Circuit Judge: The National Labor Relations Board here petitions this Court to enforce its order against the respondent, Burnup and Sims, Inc. 137 N.L.R.B. 766.

The respondent was engaged in the manufacture, sale and installation of concrete products on September 20, [fol. 289] 1961, when nineteen of respondent's employees, most of whom were truck drivers, held a meeting near one of respondent's plants and discussed wages. Selecting Robert Davis their spokesman, the employees decided to ask for a 15-cent an hour wage increase. On the next morning they made such a request to the plant superintendent, Doyle Tawney. When the plant manager, Carl Moritz, arrived the superintendent informed him that the men refused to work unless they were given

a raise. Moritz said to assemble them in a warehouse nearby. On being assembled, the men, speaking through Davis, reiterated their demand for a 15-cent raise. As found by the Trial Examiner and adopted as a fact by the Board, employee Harmon "conspicuously align[ed] himself with Davis" during their discussion. The meeting bore no fruit and Moritz asked the employees to return to work. They refused and instead went in front of the warehouse to discuss the matter further among themselves. Davis and another employee, John McKnight, left in McKnight's car to contact a union representative. They were unsuccessful and returned to the meeting where Moritz was addressing the men who were still assembled in front of the warehouse. Prior to their return, Harmon and several others had asked questions concerning the wage increase. Davis reassumed the leadership of the group after he got back and the meeting finally ended with Moritz promising the increase within thirty days. Thereafter, the men returned to work. That evening Moritz asked McKnight if he would have gone through with what he had started that morning. After ascertaining that Moritz was referring to the walkout Mc-
[fol. 290] Knight replied, "Yes, my father told me once I made my play to follow it through and I had made my play."

On September 22, 1961, Davis contacted the president and vice president of Local 172 of the Airline Supply Technicians (affiliated with the Teamsters Union) and was told to find out whether a substantial number of employees were interested in the union.

Three days later, Moritz told Tawney that he intended to grant pay increases and that he would have to reduce his working force. He asked Tawney for a list of employees to be considered for layoff.

On September 29, 1961, McKnight, Davis and Harmon were laid off. The names of seven men were brought up as possibilities and these three were picked for reasons, according to Moritz and Tawney, other than their labor activities. However, the Board found, overruling the Trial Examiner, that the layoffs were discriminatorily motivated in violation of Section 8(a)(3) and (1) of the

National Labor Relations Act, as amended. The true ground, according to the Board, was the prominent part these three had played in the walkout. Suffice it here to say that taking the record as a whole, we cannot say that this finding is not supported by substantial evidence. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456.

On October 1, 1961, wage increases were put into effect, ranging from five to fifteen cents an hour, for [fol. 291] all the employees in that operation. Moritz had been authorized by the home office prior to the walkout to grant raises of five cents an hour across the board. However, up until October 1, he had not done so.

The events which we regard as essential in reaching our decision occurred after the layoffs. On October 13 or 14, 1961, Tawney was approached by employee Pate and told that Harmon and Davis, while soliciting him to sign a union authorization card, had made threats against company property. Tawney testified that Pate told him that Harmon actually made the threatening remark with Davis standing by. Tawney testified,

> "And during the course of the conversation they made the statement that if they didn't get their jobs back, if the union didn't get in, it would be fixed so no one could work.
>
> "Q. It would be fixed so no one could work? A. By using dynamite on the silos, the storage silos."

When Tawney reported his conversation with Pate to Moritz, the latter said "we have really got trouble." On October 25, 1961, Pate signed a sworn statement to the same effect, except that he attributed the remarks to Davis, rather than Harmon. However, again he said that Harmon and Davis were together when the remarks were made.

[fol. 292] On November 8, 1961, Moritz sent identical letters to Davis and Harmon which read as follows:

> "When you were laid off on September 29, 1961, it was with the understanding that business in your particular job was slow and that you would have

'first call' on any job that came available once business picked up.

"Business is now picking up, but I regret to advise you that I cannot re-employ you.

"It has come to my attention that you made or condoned serious threats to damage property of the company should the union fail to win its election. Under such circumstances I cannot re-employ you with our company."

Neither Harmon nor Davis made any attempt to correct the respondent concerning the letters of discharge. At the hearing before the Trial Examiner, both Davis and Harmon denied that they had made these threats to Pate. Harmon said he had visited Pate once, alone, to get his signature on an authorization card. Davis testified that he never visited Pate. Each denied ever having made these statements or the other having made them in his presence. Pate did not testify.

In order to complete this brief resume of the facts, we shall finish the McKnight story. He was subsequently taken back as a truck driver and eventually dismissed for cause. The Board did not order that respondent reinstate him but simply that he be made whole for the [fol. 293] wages lost between the time of his discriminatory layoff and recall. With this we agree.

As for Davis and Harmon, the Board found that respondent had violated Section 8a(3) and (1) of the Act in discharging them and ordered their reinstatement with back pay from the time of their layoff on September 29, 1961. As before noted, the Trial Examiner held that the General Counsel had failed to prove the illegality of both the layoffs and the discharges and recommended that the complaint be dismissed.

There are three issues in the case. First, whether there is substantial evidence supporting the Board's finding that the layoffs were discriminatorily motivated. As we pointed out in the recital of the facts, the record taken as a whole contains sufficient evidence to uphold the Board's finding. The other two issues raise questions of law. We are to decide whether an employer can dismiss an employee on the belief held in good faith that he

has engaged in serious acts of misconduct or disloyalty, even though the alleged misconduct occurred during a time when the employee was engaged in activity protected by the Act. The Board found as a fact that the threats were not made. Therefore we must decide the belief as being in good faith, but mistaken. The third issue involves the inclusion of the period between the Trial Examiner's report and its reversal by the Board in the computation of back pay. Our resolution of the first [fol. 294] of these two issues renders a decision on the other unnecessary.

In its opinion, the Board relies on *Rubin Bros. Footwear, Inc.*, 99 N.L.R.B. 610, order vacated and set aside, 5th Cir. 1953, 203 F. 2d 486, holding "that, when in the course of protested activity, employees are accused of misconduct and a respondent takes action affecting their employment tenure based on a belief that the employee has engaged in misconduct, such an honest belief would be an adequate defense to a charge of discrimination for refusing to reinstate such employee *unless it affirmatively appears that such misconduct did not in fact occur*. 137 N.L.R.B. 766, 772-73 (Emphasis in original). Crediting the denials of Harmon and Davis and noting that Pate had not testified nor had any attempt been made to use his affidavit as proof of the truth of the statements made therein, the Board found such affirmative proof. The resolution of this issue turns on whether the italicized words from the Board's opinion state a sound and controlling rule.

The respondent relies on this Court's disposition of Rubin's on appeal. In that case one Rawlins, who had allegedly been discriminatorily discharged for protected activity, was standing at the entrance of the employer's establishment with a group of fellow strikers. When two nonstriking employees approached to go to work, they were beaten by members of the group. One of them told the company that Rawlins had struck him. But the Board found that this was not true and ordered Rawlins' [fol. 295] reinstatement. This Court vacated this order on the ground that "whether he did or did not strike a blow, he was, under the undisputed testimony and in the

sense of criminal participation, aiding and abetting in the fight." 203 F. 2d 486, 488. In its discussion, however, the Court stated a principle which we apply in this case. There the Court said:

> "But over and above all this, there is a fatal defect in the finding of examiner and board that, even if the employers in good faith believed, as the undisputed evidence shows, and even the board concedes they did, that Rawlins was a brawler, and discharged him in good faith because they so believed, and not for his union activities, the discharge could be held discriminatory unless the employer assumed and discharged the burden to the satisfaction of examiner and board that the belief was well founded, that is that Rawlins had in fact struck a blow as Odum claimed.
>
> "This court, and we think, all other courts have held to the contrary. If anything is settled in labor law and under the act, we think it is that membership in a union does not guarantee the member against a discharge as such. It affords protection against discharge only where it is established that the discharge is because of union activity. The board is without power, as it seems to have undertaken in this and in some other of its decisions to do, [fol. 296] to lay down a rule to the contrary." 203 F. 2d 486, 487-88.

We so hold. If the employer can establish that he had a good faith belief that an employee has engaged in misconduct such as here, it need not appear that the alleged misconduct in fact occurred. The burden of proving that an employer has discouraged union membership by discrimination in regard to terms and conditions of employment is on the General Counsel, *N.L.R.B.* v. *Ray Smith Transport Co.*, 5th Cir. 1951, 190 F. 2d 142. Moreover he must show, not that the employer's activity tended to discourage union membership, but that there was discrimination against an employee motivated by a desire to discourage protected activity. See the concurring opinion of Mr. Justice Harlan in *Local 357, Team-*

sters Union v. *N.L.R.B.*, 365 U. S. 667, 678-80, 81 S. Ct. 835, 6 L. Ed. 2d 11. This is not a case such as *Radio Officers' Union* v. *N.L.R.B.*, 347 U. S. 17, 74 S. Ct. 323, 98 L. Ed. 455, where the Supreme Court stated that "an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established" 347 U. S. 17,45. In that case the employer had given wage increases and other benefits to union members but had declined to do so for nonunion employees. The union was the sole bargaining representa- [fol. 297] tive for the plant. The employer defended its action on the ground that it was merely responding to union pressure and had no intent to encourage unionism. Furthermore, it claimed, this action could not have the effect of encouraging union membership, because the union was closed and the nonmembers could not get in if they wished. This decision points up the importance in this type of case of the motive of the employer. Discharging an employee is not in itself discouraging to organizational or other protected activities. In fact if it does discourage the discharged employee or his fellow workers, it is not a violation of the Act if the employer's motivation was not discriminatory. Wage and benefit differentials inherently encourage; a discharge does not inherently discourage. The difference is crucial. In the latter situation, motivation is determinative; in the former it is irrelevant. In this case the motivation was the belief that men had threatened to dynamite property; the intent was to rid the plant of those from whom the threat was believed to have emanated. We think it cannot be said that this was discrimination discouraging protected activity.

Nor do we feel that the rationale of *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793, 65 S. Ct. 982, 89 L. Ed. 1372, applies. There the Court held, inter alia, that a nondiscriminatory no-solicitation rule as applied against employees soliciting for union members during the employees' free time in a plant whose personnel was widely

scattered violated Section 8(a)(1) of the Act. It followed therefore that discharges made pursuant to such a rule [fol. 298] violated Section 8(a)(3). "It seems clear" said the Court, "that if a rule against solicitation is invalid as to union solicitation on the employer's premises during the employee's own time, a discharge because of violation of that rule discriminates within the meaning of § 8(3) in that it discourages membership in a labor organization." 324 U. S. 793, 805. The defense of the discharge there consisted of the invalid rules; without the rules there was no defense. Here on the other hand the defense is a bona fide attempt to protect company property.

The petitioner stresses *N.L.R.B.* v. *Local 1229, Int'l Bhd. of Elec. Workers*, 346 U. S. 464, 74 S. Ct. 172, 98 L. Ed. 195, as supporting its position. In that case ten striking television technicians were fired because of a handbill distributed to the public denouncing the quality of their employer and its programs. The handbills made no reference to the labor dispute. The Court held that where nine of the technicians were involved, their acts of disloyalty warranted their dismissal. However, as for the tenth who had not actually participated the Court stated:

> "The courts have refused to reinstate employees discharged for 'cause' consisting of insubordination, disobedience or disloyalty. In such cases, it often has been necessary to identify individual employees, somewhat comparable to the nine discharged in this case, and to recognize that their discharges were for causes which were separable from the concerted activities of others whose acts might come within [fol. 299] the protection of § 7. It has been equally important to identify employees, comparable to the tenth man in the instant case, who participated in simultaneous concerted activities for the purpose of collective bargaining or other mutual aid or protection but who refrained from joining the others is separable acts of insubordination, disobedience or disloyalty. In the latter instances, this sometimes led to a further inquiry to determine whether their concerted activities were carried on in such a manner

as to come within the protection of § 7." 346 U. S. 464, 474-75.

The question here presented did not arise in the *Local 1229* case. No claim was presented to the Court that the tenth man should not have been reinstated. Moreover, the Court went on to say that "the legal principle that insubordination, disobedience or disloyalty is adequate cause for dismissal is plain enough. The difficulty arises in determining whether, in fact, the discharges are made because of such a separable cause or because of some other concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection which may not be adequate cause for discharge." 346 U. S. 464, 475. It is apparent that in this case the Court was thinking in terms of an employee discharged for a legitimate cause and one discharged for protected activities. The case is not in opposition to our holding. In fact we take the language last quoted as supporting our view. Here there was an honest belief that the employee had [fol. 300] engaged in unprotected activity which warranted dismissal. The General Counsel cannot dispose of his burden by showing that the belief was erroneous; he must go further and show that the belief was not bona fide. The test for determining whether a discharge is wrongful under such circumstances as are presented by this case is the motive behind it. *N.L.R.B.* v. *Atkins Transfer Co.*, 6th Cir. 1955, 226 F. 2d 324. "What is vital is whether [a change in union prestige] results from discrimination and such discrimination had as its purpose encouraging or discouraging union membership." *N.L.R.B.* v. *Dalton Brick & Tile Corp.*, 5th Cir. 1962, 301 F. 2d 886, 896. Under this test the Board is not entitled to the enforcement of its order.

The Board relies on *N.L.R.B.* v. *Industrial Cotton Mills*, 4th Cir. 1953, 208 F. 2d 87, cert. den. 347 U. S. 935, 74 S. Ct. 630, 98 L. Ed. 1086. There a striking employee was taken into custody for throwing tacks on the road during the course of a strike but later released. The employer refused to reinstate him after the strike on the ground that he had engaged in this destructive and unprotected activity. It was found as a matter of fact

that he had not thrown any tacks. The employer resisted the Board's order on the ground that it had an honest belief that the employee had behaved reprehensibly. The Court held, however, that the mistaken belief was no defense where the employee was engaged in admittedly protected activity and was in fact innocent of the charges for which he was discharged. There the Court said:

[fol. 301] "It is conceded by counsel for both Industrial and the Board that if Industrial had refused reinstatement to Stallings on the honest but mistaken belief that Stallings had been guilty of some crime, such as arson or robbery, entirely disconnected with the strike, the union or concerted activity of the employees, then the Board could not order his reinstatement. Such conduct is without the ambit and beyond the purview of the National Labor Relations Act (hereinafter called the Act), 29 U.S.C.A. § 151 et seq.

"The question then remains whether the Board has the power to order the reinstatement of Stallings when his employer has refused reinstatement to him after the strike on account of the employer's honest but mistaken belief that Stallings had been guilty of *strike misconduct*. By the term 'strike misconduct' we mean, broadly, misconduct arising out of, developed by, or closely connected with, the strike. The Board, correctly we think, answered this question in the affirmative." 208 F. 2d 87, 90.

Perhaps the only material difference between this case and *Industrial Cotton*, *supra*, is that the latter involved a strike and the former involves solicitation for union membership. But we shall not strain the point by seeking a distinction in this difference. Both activities are protected. But likewise we cannot agree with the distinction drawn in *Industrial Cotton* between unprotected activity related to that which is protected, and unprotected activity not so related. We believe that unpro- [fol. 302] tected activity is unprotected. A good faith belief that the employee has engaged in it is sufficient reason to discharge him no matter what the circum-

stances. This does not mean that the circumstances may not indicate bad faith. And the fact that the employee was engaging in protected activity might be a factor in determining that the employer was not in good faith. But given the food faith in either context it is our view that the employer is at liberty to take such disciplinary measures as he finds appropriate. As we read the opinion of the *Industrial Cotton* case the court would sustain the employer in refusing reinstatement to one who was honestly but mistakenly believed to have been guilty of arson, unless the property burned was the dwelling or place of business of the employer and the discharged employee had been soliciting union membership. We are not willing to adopt a rule based upon such reasoning. Following *Industrial Cotton* is *N.L.R.B.* v. *Cambria Clay Products Co.*, 6th Cir. 1954, 215 F. 2d 48, which reaches the same result and adopts the reasoning of the *Industrial Cotton* case.

Two other cases are cited by the Board as sustaining its holding, In re *Cusano*, 3rd Cir. 1951, 190 F. 2d 898, and *Salt River Valley Water Users' Association* v. *N.L.R.B.*, 9th Cir. 1953, 206 F. 2d 325. In the *Cusano* case there was nothing to substantiate the claim that the employer had a good faith belief that the employee had done the misdeed, in this case lying to his fellow employees about the firm's profit figures.

There is, however, dicta in the *Cusano* opinion which may not be in accord with our holding. In assessing [fol. 303] the argument made in the case that there was no violation where the basis for the discharge was a reasonable belief that the employee had lied, the Court stated:

> "It is true that an employer may discharge an employee for a good reason, a bad reason, or no reason at all. . . . This rule, however, is necessarily limited where an employee is engaging in activities protected by the Act. The right of a union official or representative to inform his fellow employees of the proceedings at the Board's regional office is certainly one of the activities so protected. To adopt petitioner's view would materially weaken the guarantees of the Act, for the extent of the employees'

protected rights would be made to vary with the state of the employer's mind. We conclude that if the conduct giving rise to the employer's mistaken belief is itself protected activity, then the employer's erroneous observations cannot justify the discharge." 190 F. 2d 898, 902-03.

If, as the Court states, the employer can discharge an employee for no reason at all, it would seem that he could discharge him for a bona fide belief that he had a good reason. But, as we said before, this case is inapposite for the reason that there was no real substance to the claim of good faith.

In the *Salt River Valley Water Users* case, the employee had been discharged for protected activity. The employer contended that in good faith it believed that his acts justified dismissal. As the Court correctly held, [fol. 304] the employer's good faith is immaterial "where the activity for which . . .[the employee] was discharged was actually protected by the Act." 206 F. 2d 325, 329. This situation is plainly different from the one here, where the reason for the discharge was the honest belief that the employee had engaged in misconduct outside the protection of the Act.

The Board followed its decision in the *Rubin* case, 99 N.L.R.B. 610, buttressed primarily by the Fourth Circuit's *Industrial Cotton* opinion. If we were not disposed to follow the decision of this Court in the *Rubin* case as a precedent, we would apply the sound principles there stated, with the result that we do not enforce that portion of the Board's order requiring reinstatement of Davis and Harmon. We are of the opinion, and so hold, that Davis and Harmon should be made whole for any loss of pay suffered by them during the interval between the date they were laid off and the date they were discharged. The Board's order is modified accordingly. As ordered by the Board, McKnight is entitled to be made whole for loss of pay. The Board's order will be modified, and as modified will be enforced.

MODIFIED AND ENFORCED.

[fol. 305]

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20117

[File Endorsement Omitted]

[Title Omitted]

MOTION TO MODIFY PROPOSED DECREE—filed September 5, 1968

Comes now BURNUP AND SIMS, INC., Respondent, through its counsel, and respectfully moves this Honorable Court to modify the Appendix to the proposed Decree furnished to this Court by the National Labor Relations Board, Petitioner. Respondent moves that the Appendix to said proposed Decree be modified in the following particulars:

1.

That the first paragraph of said Appendix be amended to read as follows:

> "A decree of the United States Court of Appeals modifying and enforcing as modified an order of the National Labor Relations Board. . ."

Said amendment reflects the true ruling of this Honorable Court.

2.

That the second paragraph of said Appendix be amended to read:

> "WE WILL NOT layoff our employees for engaging in concerted activities for their mutual aid or protection."

Said amendment reflects the true fact that no unlawful discharge was found by this Honorable Court. Further, no unlawful activity under the Labor-Management Relations

Act was found by this Honorable Court other than an initial layoff of three individuals. The paragraph as proposed by Petitioner goes beyond conduct found unlawful by this Honorable Court, is unnecessary to the Notice, and unduly prejudices Respondent.

[fol. 306] 3.

That paragraph three be modified to read:

> "WE WILL NOT discourage membership in LOCAL UNION NO. 172, AIRLINES SUPPLY TECHNICIANS, affiliated with INTERNATIONAL BROTHERHOOD of TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, and HELPERS of AMERICA, or in any other labor organization of our employees by laying off our employees."

Neither Petitioner, nor this Honorable Court, found that Respondent had threatened, coerced, or interrogated its employees within the meaning of Section 8(a)(1) of the Labor-Management Relations Act, as amended. The only violation found by this Honorable Court was an initial layoff of three employees for a short period of time. The paragraph as proposed by Petitioner goes far beyond Petitioner's own finding and the findings of this Honorable Court, and as such, unduly prejudices Respondent.

4.

That paragraph four relating specifically to making whole Robert J. Davis, Joseph H. Harmon and John P. McKnight for loss of pay be deleted in its entirety. Said paragraph in no way tends to govern or control the conduct of Respondent as it affects its employees. As a Notice to its employees, said paragraph in no way advises the employees of Respondent of their rights, or of the Respondent's intention to respect rights guaranteed by the Labor-Management Relations Act. Said paragraph is meant only to prejudice and embarrass Respondent, and will in no way effectuate the policies of the Act as a Notice to all employees.

5.

That the final paragraph of said Notice be deleted in its entirety. Neither Petitioner, National Labor Relations Board, nor this Honorable Court found that Respondent promised any benefits, made any threats, unlawfully interrogated, or otherwise violated Section 8(a)(1) of the Labor-Management Relations Act. The sole finding of this Honorable Court was that a layoff of three individuals was unlawful. Said last paragraph goes far beyond the findings of either the Petitioner or this Honorable Court. As a Notice of a course of condct which Respondent agrees [fol. 307] to follow, all standards of conduct are previously set forth in paragraphs one and two of the Notice.

6.

That the Court adopt as an appendix to its Decree the Notice proposed by Respondent and attached hereto.

WHEREFORE, Respondent prays this Honorable Court amend the Appendix to the proposed Decree as set forth herein.

FISHER & PHILLIPS

By /s/ Ray C. Muller
Counsel for Respondent

26 Pryor Street, N. E.
Atlanta 3, Georgia

[fol. 308]

APPENDIX TO DECREE

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A decree of the United States Court of Appeals modifying and enforcing as modified an order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT layoff our employees for engaging in concerted activities for their mutual aid or protection.

WE WILL NOT discourage membership in LOCAL UNION NO. 172, AIRLINES SUPPLY TECHNICIANS affiliated with INTERNATIONAL BROTHERHOOD of TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, and HELPERS of AMERICA, or in any other labor organization of our employees by laying off our employees.

BURNUP AND SIMS, INCORPORATED
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Ross Building, 112 Cass Street, Tampa 2, Florida (Tel.: 223-4623), if they have any questions concerning this Notice or compliance with its provisions.

[fol. 309]

CERTIFICATE OF SERVICE [Omitted in printing]

[fol. 310]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20,117

[File Endorsement Omitted]

[Title Omitted]

PETITIONER'S REPLY TO RESPONDENT'S MOTION TO MODIFY PROPOSED DECREE—filed October 11, 1963

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

Comes now the National Labor Relations Board, petitioner, through its counsel, and respectfully moves this Honorable Court to deny respondent's Motion to Modify Proposed Decree except as to the proposed modification in Paragraph 1 of respondent's Motion which modification petitioner hereby agrees to. In support of its position, petitioner states as follows:

1. Respondent's motion to modify the decree proposed by the Board seeks to amend or delete certain language in the Appendix which it is required to post. As is normally the case, the notice required to be posted reflects the order itself. The Board's order has been appropriately modified in accordance with the Court's opinion, and the notice has been similarly modified in the decree proposed by the Board.

2. The second paragraph of the notice thus embodies the appropriate cease and desist portion of the order, the Court having agreed with the Board that respondent Company violated Section 8(a)(3) and (1). The order, and notice, are in the usual form for violations of these sections.

[fol. 311] 3. The third paragraph of the notice similarly reflects the appropriate portion of the cease and desist order, and is the normal language, universally approved by

the various courts of appeals, when violations of Section 8(a)(3) and (1) have been committed.

4. The fourth paragraph of the notice, to the effect that respondent will make whole the discriminatees, also states only what the appropriate affirmative part of the order requires. There is no warrant for respondent's assertion that it "is meant only to prejudice and embarrass" respondent. A notice to employers in these circumstances manifestly should include the "make whole" language in order to show the employees that the violations have been, or will be, remedied.

5. The fifth paragraph of the notice reflects the general cease and desist provision of the order, which is a normal provision when violations of Section 8(a)(3) and (1) have been committed, violations which go to the heart of the Act. Furthermore, respondent did not earlier raise any objection to this portion of the Board's order as being too broad, and cannot now litigate that question by objecting to the form of the notice in the proposed decree.

WHEREFORE, petitioner prays that this Honorable Court deny respondent's Motion to Modify the Proposed Decree, except as to Paragraph 1, and enter the decree with that modification, as proposed by the Board.

/s/ Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.,
this 9th day of October, 1963.

[fol. 312]

CERTIFICATE OF SERVICE
[Omitted in printing]

[fol. 313]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20117

[Title Omitted]

ORDER DENYING MOTION TO MODIFY PROPOSED DECREE—
Filed November 14, 1963

* * * *

Before TUTTLE, Chief Judge and JONES, Circuit Judge.

BY THE COURT:—

The motion of the respondent for a modification of the proposed decree is DENIED.

[fol. 314]

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[File Endorsement Omitted]

No. 20117

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BURNUP AND SIMS, INC., RESPONDENT

DECREE—entered November 14, 1963

Before: Tuttle, Chief Judge, Jones, Circuit Judge, and DeVane, District Judge.

BY THE COURT:—

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of an order issued by it against the above-named respondent on June 25, 1962. The Court heard argument of respective counsel on May 8, 1963, and has considered the briefs and transcript of record filed in this cause. On August 22, 1963, the Court, being fully advised in the premises, handed down its opinion granting the Board's order as modified. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Fifth Circuit that the Respondent, Burnup and Sims, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Laying off, discharging, or otherwise discriminating against its employees for engaging in concerted activities for their mutual aid or protection;

(b) Discouraging membership in Local Union No. 172, Airlines Supply Technicians, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of its employees, by discharging employees or otherwise discriminating in regard to their hire or tenure of employment or any term or condition of employment;

(c) In any other manner interferring with, restrain-
[fol. 315] ing, or coercing its employees in the exercise of the right to self-organization, to form, join or assist any labor organization, to bargain collectively through a representative of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all of such activities.

2. Take the following affirmative action which the Board found will effectuate the policies of the National Labor Relations Act (hereinafter called the Act):

(a) Make whole Robert J. Davis and Joseph H. Harmon for any loss of pay suffered by them during the interval between the date they were laid off and the date they were discharged, and make whole John P. McKnight for any loss of pay he may have suffered, by reason of the discrimination against them in the manner set forth in the section of the Board's Decision and Order entitled The Remedy.

(b) Post at its offices and plants in Melbourne, Eau Gallie, and Cocoa, Florida, copies of the notice attached hereto marked Appendix. Copies of said notice to be furnished by the Regional Director for the Twelfth Region (Tampa, Florida), shall, after being duly signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Preserve and, upon request, make available to the Board, or its agents, for examination and copying, all payroll records, timecards, reports, social security payment records, and all other records and reports necessary to determine the amounts of backpay due under the terms of this Decree.

[fol. 316] (d) Notify the aforesaid Regional Director, in writing, within 10 days from the date of this Decree what steps Respondent has taken to comply herewith.

ENTERED: November 14, 1963

[fol. 317]

APPENDIX TO DECREE

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A decree of the United States Court of Appeals enforcing an order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT layoff, discharge or otherwise discriminate against our employees for engaging in concerted activities for their mutual aid or protection. WE WILL NOT discourage membership in LOCAL UNION NO. 172, AIRLINES SUPPLY TECHNICIANS, affiliated with INTERNATIONAL BROTHERHOOD of TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, and HELPERS of AMERICA, or in any other labor organization of our employees by discharging our employees or otherwise discriminating in regard to their hire or tenure of employment or the terms or conditions of employment. WE WILL make whole Robert J. Davis and Joseph H. Harmon for any loss of pay suffered by them during the interval between the date they were laid off and the date they were discharged, and make whole John P. McKnight for any loss of pay he may have suffered, by reason of the discrimination against them. WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

BURNUP AND SIMS, INCORPORATED
(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Ross Building, 112 Cass Street, Tampa 2, Florida, (Tel.: 223-4623) if they have any questions concerning this Notice or compliance with its provisions.

[fol. 318]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 319]

SUPREME COURT OF THE UNITED STATES

No. 637, October Term, 1963

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

BURNUP AND SIMS, INC.

ORDER ALLOWING CERTIORARI—January 13, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 724284 773

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
A. The Board's decision and order	2
B. The decision of the court of appeals	5
Reasons for granting the writ	6
Conclusion	10
Appendix A	11
Appendix B	30

CITATIONS

Cases:

Bonnar-Vawter, Inc., 129 NLRB 127	9
Cusano v. *National Labor Relations Board*, 190 F. 2d 898	7, 8
Fry Products, Inc., 110 NLRB 1000	9
Hill & Hill Truck Line, Inc., 120 NLRB 101	9
Local 357, Teamsters v. *National Labor Relations Board*, 365 U.S. 667	8, 9
Longview Furniture Co., 100 NLRB 301	9
National Labor Relations Board v. *Cambria Clay Products Company*, 215 F. 2d 48	7
National Labor Relations Board v. *Erie Resistor Corporation*, 373 U.S. 221	8
National Labor Relations Board v. *Industrial Cotton*, 208 F. 2d 87, certiorari denied, 347 U.S. 935	7, 8
Patterson-Sargent Co., The, 115 NLRB 1627	9
Porto Rico Container Corp., 89 NLRB 1570	9
Radio Officers' Union v. *National Labor Relations Board*, 347 U.S. 17	8

Cases—Continued Page

Rubin Bros. Footwear, Inc., 99 NLRB 610, enforcement denied, 203 F. 2d 486 ..... 5, 6
Stewart Hog Ring Co., Inc., 131 NLRB 310 9

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et. seq.*)
Section 7 ..... 9, 30
Section 8(a)(1) 3, 4, 5, 30
Section 8(a)(3) 4, 5, 30

In the Supreme Court of the United States

OCTOBER TERM, 1963

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BURNUP AND SIMS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit entered in this case on August 22, 1963.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 11-25) is reported at 322 F. 2d 57. The findings of fact, conclusions of law, and order of the Board (R. 61-81)[1] are reported at 137 NLRB 766.

---

[1] "R." refers to Volume I, Transcript of Record, filed in the court of appeals; "J.A." refers to portions of the testimony and exhibits printed in a joint appendix filed therein. Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

JURISDICTION

The decision of the court of appeals was rendered on August 22, 1963, and a decree was entered on November 14, 1963 (App. A, *infra*, pp. 11, 26-28). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether an employer abridges employee rights, in violation of the National Labor Relations Act, where he discharges employees whom he knows are engaged in solicitation for union membership under a good faith but mistaken belief that, as part of such activity, they engaged in misconduct which would warrant their discharge.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in App. B, *infra*, pp. 29-30.

STATEMENT

A. The Board's Decision and Order

The Board found that on September 21, 1961, approximately 19 of respondent's truckdrivers[2] staged a walkout in support of a demand for a wage in-

[2] Respondent is engaged in the manufacture, sale and installation of concrete, concrete blocks, ready-mixed concrete, and related products. The events herein occurred at the Company's plant in Melbourne, Florida. (R. 34; J.A. 8).

crease; that the leaders in this activity were employees Robert J. Davis, Joseph H. Harmon and John P. McKnight; that the men returned to work after plant manager Carl Moritz assured them wage increases would be forthcoming within 30 days; and that thereafter, on September 29, 1961, respondent laid off Davis, Harmon, and McKnight in retaliation for their role in the concerted activity and to discourage such activity in the future, thereby violating Section 8(a)(1) of the Act (R. 62-63).

After their layoff, Davis and Harmon actively engaged in efforts to organize the employees on behalf of the Union,[3] calling upon employees at their homes (R. 72; J.A. 28, 40, 50-51). On October 13 or 14, 1961, Plant Superintendent Tawney was approached by employee Pate and told that Harmon and Davis, while soliciting him to sign a union authorization card, had made threats against Company property. According to Tawney, Pate stated that Harmon and Davis warned that "if they didn't get their jobs back, if the union didn't get in, it would be fixed so no one could work;" it would be fixed by "using dynamite on the silos, the storage silos" (R. 41; J.A. 160, 180-181). Tawney reported his conversation with Pate to Moritz (R. 41-42; J.A. 96, 160).

On November 8, 1961, Moritz sent identical letters to Davis and Harmon, which read as follows (R. 71; J.A. 195, 196):

---

[3] Local Union No. 172, Airline Supply Technicians, affiliated with International Brotherhood of Teamsters (R. 34).

> When you were laid off on September 29, 1961, it was with the understanding that business in your particular job was slow and that you would have "first call" on any job that came available once business picked up.
>
> Business is now picking up, but I regret to advise you that I cannot re-employ you.
>
> It has come to my attention that you made or condoned serious threats to damage property of the company should the union fail to win its election. Under such circumstances I cannot re-employ you with our company.

At the Board hearing, both Davis and Harmon denied that they had made any threats to Pate. Harmon said he had visited Pate once, alone, to obtain his signature on an authorization card. Davis testified that he never visited Pate (R. 43; J.A. 32, 40, 63, 64). The Company did not call Pate to testify, although admitting that he was present at the hearing (J.A. 99, 166).

On the basis of the foregoing, the Board concluded that Davis and Harmon had not engaged in the misconduct alleged, and that, by changing their status from layoff to permanent discharge, the Company violated Sections 8(a)(3) and (1) of the Act. The Board found that the alleged misconduct was only a pretext for penalizing Davis and Harmon because of their union activity.[4] The Board added that, even if the

---

[4] The Board stated (R. 74):

> It is undisputed, and Respondent knew, that the alleged misconduct was asserted to have taken place while Davis and Harmon were engaged in protected union activity, the solicitation of union membership and

Company believed in good faith that they had engaged in misconduct, such a good faith belief would not privilege the discharges since it affirmatively appeared that no misconduct had in fact ocurred (R. 73-74).[5]

The Board's order (R. 76-79), *inter alia*, required the Company to cease and desist from the unfair labor practices found, to offer Davis and Harmon reinstatement, and to make them whole for any loss of pay resulting from the discrimination.

B. The Decision of the Court of Appeals

The court of appeals held that there was substantial evidence to support the Board's finding that the layoffs of September 29, 1961, were discriminatorily motivated, in violation of Section 8(a)(1) of the Act, and enforced the part of the Board's order relating thereto (App. A, *infra*, pp. 13, 15, 25). However, the court declined to sustain the Board's finding that the discharge of Harmon and Davis violated Section 8(a)(3) and (1) of the Act. The court, accepting the Board's finding that Harmon and Davis had not

---

authorization cards. In view of this knowledge and in view of the fact that these employees were laid off discriminatorily because of Respondent's desire to rid itself of employees who it knew were leaders in the protected concerted activity, we can only conclude that, because of their union activity, Respondent seized up-[on] their purported misconduct as an excuse to convert the layoffs of Davis and Harmon into discharges.

[5] In this respect, the Board applied the principle enunciated in *Rubin Bros. Footwear, Inc.*, 99 NLRB 610, enforcement denied, 203 F. 2d 486 (C.A. 5).

in fact engaged in misconduct but concluding that the Company in good faith thought that they had,[6] held that, since the employer's motive was not discriminatory, the discharges were not unlawful. The court stated (App. A, *infra*, pp. 18-19):

> Discharging an employee is not in itself discouraging to organizational or other protected activities. In fact if it does discourage the discharged employee or his fellow workers, it is not a violation of the Act if the employer's motivation was not discriminatory. * * * In this case the motivation was the belief that men had threatened to dynamite property; the intent was to rid the place of those from whom the threat was believed to have emanated. We think it cannot be said that this was discrimination discouraging protected activity.[7]

REASONS FOR GRANTING THE WRIT

As the court below acknowledged (App. A, *infra*, pp. 22-23), its holding that an employer does not violate the Act where he discharges employees whom he knows to be engaged in concerted activity under a good faith, but mistaken, belief that as part of that activity they engaged in misconduct is in direct conflict with *National Labor Relations Board* v. *Indus-*

---

[6] The court thus in effect rejected the Board's alternative finding that the misconduct was only a pretext for the discharges (see *supra*, p. 4). The propriety of this action is not questioned here.

[7] The Court's holding is in accord with its earlier decision in *Rubin Bros. Footwear, Inc.* v. *National Labor Relations Board*, 203 F. 2d 486 (Rives, J., dissenting).

trial Cotton Mills, 208 F. 2d 87, 89-93 (C.A. 4), certiorari denied, 347 U.S. 935, and *National Labor Relations Board* v. *Cambria Clay Products Company*, 215 F. 2d 48, 53-54 (C.A. 6). In *Industrial Cotton*, the employer denied reinstatement to an unreplaced economic striker under the good faith, but mistaken, belief that he had thrown tacks on the street in front of the plant. The Fourth Circuit, accepting the Board's finding that the striker was innocent of the misconduct, agreed that the denial of reinstatement was violative of Sections 8(a)(1) and (3) of the Act, irrespective of the employer's "good" motive.[8] In *Cambria Clay*, the Sixth Circuit reached the same conclusion in a similar situation.

The decision below is also in conflict with *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 902-903 (C.A. 3), which held that the employer violated the Act by discharging an employee under an honest, but erroneous, belief that he had deliberately lied about the extent of the employer's profits in reporting to a union committee about preparations for a Board election.[9]

---

[8] The court below recognized (App. A, *infra*, p. 22) that no meaningful difference can be drawn between the instant case and *Industrial Cotton* on the ground that "the latter involved a strike and the former involves solicitation for union membership."

[9] The court below (App. A, *infra*, p. 23) sought to distinguish *Cusano* on the ground that "there was nothing to substantiate the claim that the employer had a good faith belief that the employee had done the misdeed." However, the opinion in *Cusano* reveals that the employer had secured his information about the alleged distortion of profits from

The decision in *Industrial Cotton*, rejected by the court below, was cited with approval in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 45 at n. 53; *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667, 680 (concurring opinion), and *National Labor Relations Board* v. *Erie Resistor Corporation*, 373 U.S. 221, 229 at n. 8. The context of its citation indicates the error in the ruling of the court below that the discharge here was not a violation of the Act unless shown to have been motivated by a specific intent to discourage union activity. Thus, in *Radio Officers* the Court recognized that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership and that an employer's protestation that he did not intend to encourage or discourage must be unavailable where a natural consequence of his action was such encouragement or discouragement (347 U.S. at 45). The Court cited *Industrial Cotton* as one of the cases in which "the courts have recognized that proof of certain types of discrimination satisfies the intent requirement" (*ibid.*). In his concurring opinion in *Local 357, Teamsters*, Mr. Justice Harlan referred to *Industrial Cotton* and *Cusano* v. *National Labor Relations Board, supra*, for the proposition, also pertinent here, that an "ab-

---

several employees who had been present at the committee meeting (190 F. 2d at 900), which is at least as substantial a basis for a "good faith" belief as that which existed here. Moreover, the court in *Cusano* assumed that the employer had a good faith belief, but concluded that it was irrelevant (190 F. 2d at 902).

sence of a significant business justification for the employer's acts which tended to discourage union activity explains the dispensability of proof of discriminatory motivation * * *" (365 U.S. at 680). There can be no doubt that the employer's action here in discharging the employees who were leading the drive for union recognition in the mistaken belief that they had engaged in misconduct as part of that activity will necessarily tend to discourage the exercise of union activity in the future.

The problem presented in this case is a constantly recurring one in the administration of the Act,[10] and can arise whenever employees undertake to strike or engage in other concerted activity. Accordingly, and because the effective exercise of Section 7 rights requires that the ambit of the protection afforded the employee be clearly delineated, it is important that the conflict among the circuits upon this question be resolved by this Court.

---

[10] In addition to *Rubin Bros.*, cited in n. 5, supra, see also, *e.g., Stewart Hog Ring Co., Inc.*, 131 NLRB 310, 313, 336 (1961); *Bonnar-Vawter, Inc.*, 129 NLRB 127, 138 (1960); *Hill & Hill Truck Line, Inc.*, 120 NLRB 101, 102, (1958); The *Patterson-Sargent Co.*, 115 NLRB 1627, 1631, 1666, 1674-1675. (1956); *Fry Products, Inc.*, 110 NLRB 1000, 1004 (1954); *Longview Furniture Co.*, 100 NLRB 301, 305 (1952); *Porto Rico Container Corp.*, 89 NLRB 1570, 1575-1576 (1950).

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LAURENCE GOLD,
Attorney,

National Labor Relations Board.

November 1963

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20117

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

BURNUP AND SIMS, INC., RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board, Sitting at Washington, D. C.

(August 22, 1963.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and DEVANE, District Judge.

JONES, Circuit Judge: The National Labor Relations Board here petitions this Court to enforce its order against the respondent, Burnup and Sims, Inc. 137 N.L.R.B. 766.

The respondent was engaged in the manufacture, sale and installation of concrete products on September 20, 1961, when nineteen of respondent's employees, most of whom were truck drivers, held a meeting near one of respondent's plants and discussed wages. Selecting Robert Davis their spokesman, the employees decided to ask for a 15-cent an hour wage increase. On the next morning they made such a re-

quest to the plant superintendent, Doyle Tawney. When the plant manager, Carl Moritz, arrived the superintendent informed him that the men refused to work unless they were given a raise. Moritz said to assemble them in a warehouse nearby. On being assembled, the men, speaking through Davis, reiterated their demand for a 15-cent raise. As found by the Trial Examiner and adopted as a fact by the Board, employee Harmon "conspicuously align[ed] himself with Davis" during their discussion. The meeting bore no fruit and Moritz asked the employees to return to work. They refused and instead went in front of the warehouse to discuss the matter further among themselves. Davis and another employee, John McKnight, left in McKnight's car to contact a union representative. They were unsuccessful and returned to the meeting where Moritz was addressing the men who were still assembled in front of the warehouse. Prior to their return, Harmon and several others had asked questions concerning the wage increase. Davis reassumed the leadership of the group after he got back and the meeting finally ended with Moritz promising the increase within thirty days. Thereafter, the men returned to work. That evening Moritz asked McKnight if he would have gone through with what he had started that morning. After ascertaining that Moritz was referring to the walkout McKnight replied, "Yes, my father told me once I made my play to follow it through and I had made my play."

On September 22, 1961, Davis contacted the president and vice president of Local 172 of the Airline Supply Technicians (affiliated with the Teamsters Union) and was told to find out whether a substantial number of employees were interested in the union.

Three days later, Moritz told Tawney that he intended to grant pay increases and that he would have to reduce his working force. He asked Tawney for a list of employees to be considered for layoff.

On September 29, 1961, McKnight, Davis and Harmon were laid off. The names of seven men were brought up as possibilities and these three were picked for reasons, according to Moritz and Tawney, other than their labor activities. However, the Board found, overruling the Trial Examiner, that the layoffs were discriminatorily motivated in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended. The true ground, according to the Board, was the prominent part these three had played in the walkout. Suffice it here to say that taking the record as a whole, we cannot say that this finding is not supported by substantial evidence. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456.

On October 1, 1961, wage increases were put into effect, ranging from five to fifteen cents an hour, for all the employees in that operation. Moritz had been authorized by the home office prior to the walkout to grant raises of five cents an hour across the board. However, up until October 1, he had not done so.

The events which we regard as essential in reaching our decision occurred after the layoffs. On October 13 or 14, 1961, Tawney was approached by employee Pate and told that Harmon and Davis, while soliciting him to sign a union authorization card, had made threats against company property. Tawney testified that Pate told him that Harmon actually made the threatening remark with Davis standing by. Tawney testified,

"And during the course of the conversation they made the statement that if they didn't get their jobs back, if the union didn't get in, it would be fixed so no one could work.

"Q. It would be fixed so no one could work? A. By using dynamite on the silos, the storage silos."

When Tawney reported his conversation with Pate to Moritz, the latter said "we have really got trouble." On October 25, 1961, Pate signed a sworn statement to the same effect, except that he attributed the remarks to Davis, rather than to Harmon. However, again he said that Harmon and Davis were together when the remarks were made.

On November 8, 1961, Moritz sent identical letters to Davis and Harmon which read as follows:

"When you were laid off on September 29, 1961, it was with the understanding that business in your particular job was slow and that you would have 'first call' on any job that came available once business picked up.

"Business is now picking up, but I regret to advise you that I cannot re-employ you.

"It has come to my attention that you made or condoned serious threats to damage property of the company should the union fail to win its election. Under such circumstances I cannot re-employ you with our company."

Neither Harmon nor Davis made any attempt to correct the respondent concerning the letters of discharge. At the hearing before the Trial Examiner, both Davis and Harmon denied that they had made these threats to Pate. Harmon said he had visited

Pate once, alone, to get his signature on an authorization card. Davis testified that he never visited Pate. Each denied ever having made these statements or the other having made them in his presence. Pate did not testify.

In order to complete this brief resume of the facts, we shall finish the McKnight story. He was subsequently taken back as a truck driver and eventually dismissed for cause. The Board did not order that respondent reinstate him but simply that he be made whole for the wages lost between the time of his discriminatory layoff and recall. With this we agree.

As for Davis and Harmon, the Board found that respondent had violated Section 8a(3) and (1) of the Act in discharging them and ordered their reinstatement with back pay from the time of their layoff on September 29, 1961. As before noted, the Trial Examiner held that the General Counsel had failed to prove the illegality of both the layoffs and the discharges and recommended that the complaint be dismissed.

There are three issues in the case. First, whether there is substantial evidence supporting the Board's finding that the layoffs were discriminatorily motivated. As we pointed out in the recital of the facts, the record taken as a whole contains sufficient evidence to uphold the Board's finding. The other two issues raise questions of law. We are to decide whether an employer can dismiss an employee on the belief held in good faith that he has engaged in serious acts of misconduct or disloyalty, even though the alleged misconduct occurred during a time when the employee was engaged in activity protected by the Act. The Board found as a fact that the threats were not made. Therefore we must decide the belief as being in good faith, but mistaken. The third issue

involves the inclusion of the period between the Trial Examiner's report and its reversal by the Board in the computation of back pay. Our resolution of the first of these two issues renders a decision on the other unnecessary.

In its opinion, the Board relies on *Rubin Bros. Footwear, Inc.*, 99 N.L.R.B. 610, order vacated and set aside, 5th Cir. 1953, 203 F. 2d 486, holding "that, when in the course of protected activity, employees are accused of misconduct and a respondent takes action affecting their employment tenure based on a belief that the employee has engaged in misconduct, such an honest belief would be an adequate defense to a charge of discrimination for refusing to reinstate such employee *unless it affirmatively appears that such misconduct did not in fact occur*. 137 N.L.R.B. 766, 772-73 (Emphasis in original). Crediting the denials of Harmon and Davis and noting that Pate had not testified nor had any attempt been made to use his affidavit as proof of the truth of the statements made therein, the Board found such affirmative proof. The resolution of this issue turns on whether the italicized words from the Board's opinion state a sound and controlling rule.

The respondent relies on this Court's disposition of Rubin's on appeal. In that case one Rawlins, who had allegedly been discriminatorily discharged for protected activity, was standing at the entrance of the employer's establishment with a group of fellow strikers. When two nonstriking employees approached to go to work, they were beaten by members of the group. One of them told the company that Rawlins had struck him. But the Board found that this was not true and ordered Rawlins' reinstatement. This Court vacated this order on the ground that "whether he did or did not strike a blow, he was, under the

undisputed testimony and in the sense of criminal participation, aiding and abetting in the fight." 203 F. 2d 486, 488. In its discussion, however, the Court stated a principle which we apply in this case. There the Court said:

> "But over and above all this, there is a fatal defect in the finding of examiner and board that, even if the employers in good faith believed, as the undisputed evidence shows, and even the board concedes they did, that Rawlins was a brawler, and discharged him in good faith because they so believed, and not for his union activities, the discharge could be held discriminatory unless the employer assumed and discharged the burden to the satisfaction of examiner and board that the belief was well founded, that is that Rawlins had in fact struck a blow as Odum claimed.
>
> "This court, and we think, all other courts have held to the contrary. If anything is settled in labor law and under the act, we think it is that membership in a union does not guarantee the member against a discharge as such. It affords protection against discharge only where it is established that the discharge is because of union activity. The board is without power, as it seems to have undertaken in this and in some other of its decisions to do, to lay down a rule to the contrary." 203 F. 2d 486, 487-88.

We so hold. If the employer can establish that he had a good faith belief that an employee has engaged in misconduct such as here, it need not appear that the alleged misconduct in fact occurred. The burden of proving that an employer has discouraged union membership by discrimination in regard to terms and

conditions of employment is on the General Counsel, *N.L.R.B.* v. *Ray Smith Transport Co.*, 5th Cir. 1951, 190 F. 2d 142. Moreover he must show, not that the employer's activity tended to discourage union membership, but that there was discrimination against an employee motivated by a desire to discourage protected activity. See the concurring opinion of Mr. Justice Harlan in *Local 357, Teamsters Union* v. *N.L.R.B.*, 365 U. S. 667, 678-80, 81 S. Ct. 835, 6 L. Ed. 2d 11. This is not a case such as *Radio Officers' Union* v. *N.L.R.B.*, 347 U. S. 17, 74 S. Ct. 323, 98 L. Ed. 455, where the Supreme Court stated that "an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established" 347 U. S. 17,45. In that case the employer had given wage increases and other benefits to union members but had declined to do so for nonunion employees. The union was the sole bargaining representative for the plant. The employer defended its action on the ground that it was merely responding to union pressure and had no intent to encourage unionism. Furthermore, it claimed, this action could not have the effect of encouraging union membership, because the union was closed and the nonmembers could not get in if they wished. This decision points up the importance in this type of case of the motive of the employer. Discharging an employee is not in itself discouraging to organizational or other protected activities. In fact if it does discourage the discharged employee or his fellow workers, it is not a violation

of the Act if the employer's motivation was not discriminatory. Wage and benefit differentials inherently encourage; a discharge does not inherently discourage. The difference is crucial. In the latter situation, motivation is determinative; in the former it is irrelevant. In this case the motivation was the belief that men had threatened to dynamite property; the intent was to rid the plant of those from whom the threat was believed to have emanated. We think it cannot be said that this was discrimination discouraging protected activity.

Nor do we feel that the rationale of *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793, 65 S. Ct. 982, 89 L. Ed. 1372, applies. There the Court held, inter alia, that a nondiscriminatory no-solicitation rule as applied against employees soliciting for union members during the employees' free time in a plant whose personnel was widely scattered violated Section 8(a)(1) of the Act. It followed therefore that discharges made pursuant to such a rule violated Section 8(a)(3). "It seems clear" said the Court, "that if a rule against solicitation is invalid as to union solicitation on the employer's premises during the employee's own time, a discharge because of violation of that rule discriminates within the meaning of § 8(3) in that it discourages membership in a labor organization." 324 U. S. 793, 805. The defense of the discharge there consisted of the invalid rules; without the rules there was no defense. Here on the other hand the defense is a bona fide attempt to protect company property.

The petitioner stresses *N.L.R.B.* v. *Local 1229, Int'l Bhd. of Elec. Workers*, 346 U. S. 464, 74 S. Ct. 172, 98 L. Ed. 195, as supporting its position. In that case ten striking television technicians were fired be-

cause of a handbill distributed to the public denouncing the quality of their employer and its programs. The handbills made no reference to the labor dispute. The Court held that where nine of the technicians were involved, their acts of disloyalty warranted their dismissal. However, as for the tenth who had not actually participated, the Court stated:

> "The courts have refused to reinstate employees discharged for 'cause' consisting of insubordination, disobedience or disloyalty. In such cases, it often has been necessary to identify individual employees, somewhat comparable to the nine discharged in this case, and to recognize that their discharges were for causes which were separable from the concerted activities of others whose acts might come within the protection of § 7. It has been equally important to identify employees, comparable to the tenth man in the instant case, who participated in simultaneous concerted activities for the purpose of collective bargaining or other mutual aid or protection but who refrained from joining the others in separable acts of insubordination, disobedience or disloyalty. In the latter instances, this sometimes led to a further inquiry to determine whether their concerted activities were carried on in such a manner as to come within the protection of §7." 346 U. S. 464, 474-75.

The question here presented did not arise in the *Local 1229* case. No claim was presented to the Court that the tenth man should not have been reinstated. Moreover, the Court went on to say that "the legal principle that insubordination, disobedience or disloyalty is adequate cause for dismissal is plain enough. The difficulty arises in determining whether,

in fact, the discharges are made because of such a separable cause or because of some other concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection which may not be adequate cause for discharge." 346 U. S. 464, 475. It is apparent that in this case the Court was thinking in terms of an employee discharged for a legitimate cause and one discharged for protected activities. The case is not in opposition to our holding. In fact we take the language last quoted as supporting our view. Here there was an honest belief that the employee had engaged in unprotected activity which warranted dismissal. The General Counsel cannot dispose of his burden by showing that the belief was erroneous; he must go further and show that the belief was not bona fide. The test for determining whether a discharge is wrongful under such circumstances as are presented by this case is the motive behind it. *N.L.R.B.* v. *Atkins Transfer Co.*, 6th Cir. 1955, 226 F. 2d 324. "What is vital is whether [a change in union prestige] results from discrimination and such discrimination had as its purpose encouraging or discouraging union membership." *N.L.R.B.* v. *Dalton Brick & Tile Corp.*, 5th Cir. 1962, 301 F. 2d 886, 896. Under this test the Board is not entitled to the enforcement of its order.

The Board relies on *N.L.R.B.* v. *Industrial Cotton Mills*, 4th Cir. 1953, 208 F. 2d 87, cert. den. 347 U. S. 935, 74 S. Ct. 630, 98 L. Ed. 1086. There a striking employee was taken into custody for throwing tacks on the road during the course of a strike but later released. The employer refused to reinstate him after the strike on the ground that he had engaged in this destructive and unprotected activity. It was found as a matter of fact that he had not thrown any tacks.

The employer resisted the Board's order on the ground that it had had an honest belief that the employee had behaved reprehensibly. The Court held, however, that the mistaken belief was no defense where the employee was engaged in admittedly protected activity and was in fact innocent of the charges for which he was discharged. There the Court said:

> "It is conceded by counsel for both Industrial and the Board that if Industrial had refused reinstatement to Stallings on the honest but mistaken belief that Stallings had been guilty of some crime, such as arson or robbery, entirely disconnected with the strike, the union or concerted activity of the employees, then the Board could not order his reinstatement. Such conduct is without the ambit and beyond the purview of the National Labor Relations Act (hereinafter called the Act), 29 U.S.C.A. § 151 et seq.
>
> "The question then remains whether the Board has the power to order the reinstatement of Stallings when his employer has refused reinstatement to him after the strike on account of the employer's honest but mistaken belief that Stallings had been guilty of *strike misconduct*. By the term 'strike misconduct' we mean, broadly, misconduct arising out of, developed by, or closely connected with, the strike. The Board, correctly we think, answered this question in the affirmative." 208 F. 2d 87, 90.

Perhaps the only material difference between this case and *Industrial Cotton, supra*, is that the latter involved a strike and the former involves solicitation for union membership. But we shall not strain the point by seeking a distinction in this difference. Both activities are protected. But likewise we cannot agree

with the distinction drawn in *Industrial Cotton* between unprotected activity related to that which is protected, and unprotected activity not so related. We believe that unprotected activity is unprotected. A good faith belief that the employee has engaged in it is sufficient reason to discharge him no matter what the circumstances. This does not mean that the circumstances may not indicate bad faith. And the fact that the employee was engaging in protected activity might be a factor in determining that the employer was not in good faith. But given the good faith in either context it is our view that the employer is at liberty to take such disciplinary measures as he finds appropriate. As we read the opinion in the *Industrial Cotton* case the court would sustain the employer in refusing reinstatement to one who was honestly but mistakenly believed to have been guilty of arson, unless the property burned was the dwelling or place of business of the employer and the discharged employee had been soliciting union membership. We are not willing to adopt a rule based upon such reasoning. Following *Industrial Cotton* is *N.L.R.B.* v. *Cambria Clay Products Co.*, 6th Cir. 1954, 215 F. 2d 48, which reaches the same result and adopts the reasoning of the *Industrial Cotton* case.

Two other cases are cited by the Board as sustaining its holding, In re *Cusano*, 3rd Cir. 1951, 190 F. 2d 898, and *Salt River Valley Water Users' Association* v. *N.L.R.B.*, 9th Cir. 1953, 206 F. 2d 325. In the *Cusano* case there was nothing to substantiate the claim that the employer had a good faith belief that the employee had done the misdeed, in this case lying to his fellow employees about the firm's profit figures.

There is, however, dicta in the *Cusano* opinion which may not be in accord with our holding. In assessing the argument made in the case that there

was no violation where the basis for the discharge was a reasonable belief that the employee had lied, the Court stated:

> "It is true that an employer may discharge an employee for a good reason, a bad reason, or no reason at all. . . . This rule, however, is necessarily limited where an employee is engaging in activities protected by the Act. The right of a union official or representative to inform his fellow employees of the proceedings at the Board's regional office is certainly one of the activities so protected. To adopt petitioner's view would materially weaken the guarantees of the Act, for the extent of the employees' protected rights would be made to vary with the state of the employer's mind. We conclude that if the conduct giving rise to the employer's mistaken belief is itself protected activity, then the employer's erroneous observations cannot justify the discharge." 190 F. 2d 898, 902-03.

If, as the Court states, the employer can discharge an employee for no reason at all, it would seem that he could discharge him for a bona fide belief that he had a good reason. But, as we said before, this case is inapposite for the reason that there was no real substance to the claim of good faith.

In the *Salt River Valley Water Users* case, the employee had been discharged for protected activity. The employer contended that in good faith it believed that his acts justified dismissal. As the Court correctly held, the employer's good faith is immaterial "where the activity for which . . . [the employee] was discharged was actually protected by the Act." 206 F. 2d 325, 329. This situation is plainly different from the one here, where the reason for the dis-

charge was the honest belief that the employee had engaged in misconduct outside the protection of the Act.

The Board followed its decision in the *Rubin* case, 99 N.L.R.B. 610, buttressed primarily by the Fourth Circuit's *Industrial Cotton* opinion. If we were not disposed to follow the decision of this Court in the *Rubin* case as a precedent, we would apply the sound principles there stated, with the result that we do not enforce that portion of the Board's order requiring reinstatement of Davis and Harmon. We are of the opinion, and so hold, that Davis and Harmon should be made whole for any loss of pay suffered by them during the interval between the date they were laid off and the date they were discharged. The Board's order is modified accordingly. As ordered by the Board, McKnight is entitled to be made whole for loss of pay. The Board's order will be modified, and as modified will be enforced.

MODIFIED AND ENFORCED.

DECREE

Before: Tuttle, Chief Judge, Jones, Circuit Judge, and DeVane, District Judge.

BY THE COURT:—

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of an order issued by it against the above-named respondent on June 25, 1962. The Court heard argument of respective counsel on May 8, 1963, and has considered the briefs and transcript of record filed in this cause. On August 22, 1963, the Court, being fully advised in the premises, handed

down its opinion granting the Board's order as modified. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Fifth Circuit that the Respondent, Burnup and Sims, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Laying off, discharging, or otherwise discriminating against its employees for engaging in concerted activities for their mutual aid or protection;

(b) Discouraging membership in Local Union No. 172, Airlines Supply Technicians, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of its employees, by discharging employees or otherwise discriminating in regard to their hire or tenure of employement or any term or condition of employment;

(c) In any other manner interferring with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist any labor organization, to bargain collectively through a representative of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all of such activities.

2. Take the following affirmative action which the Board found will effectuate the policies of the National Labor Relations Act (hereinafter called the Act):

(a) Make whole Robert J. Davis and Joseph H. Harmon for any loss of pay suffered by them

during the interval between the date they were laid off and the date they were discharged, and make whole John P. McKnight for any loss of pay he may have suffered, by reason of the discrimination against them in the manner set forth in the section of the Board's Decision and Order entitled The Remedy.

(b) Post as its offices and plants in Melbourne, Eau Gallie, and Cocoa, Florida, copies of the notice attached hereto marked Appendix. Copies of said notice to be furnished by the Regional Director for the Twelfth Region (Tampa, Florida), shall, after being duly signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Preserve and, upon request, make available to the Board, or its agents, for examination and copying, all payroll records, timecards, reports, social security payment records, and all other records and reports necessary to determine the amounts of backpay due under the terms of this Decree.

(d) Notify the aforesaid Regional Director, in writing, within 10 days from the date of this Decree what steps Respondent has taken to comply herewith.

Entered: Nov. 14, 1963

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A decree of the United States Court of Appeals enforcing an order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT layoff, discharge or otherwise discriminate against our employees for engaging in concerted activities for their mutual aid or protection.

WE WILL NOT discourage membership in LOCAL UNION NO. 172, AIRLINES SUPPLY TECHNICIANS, affiliated with INTERNATIONAL BROTHERHOOD of TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, and HELPERS of AMERICA, or in any other labor organization of our employees by discharging our employees or otherwise discriminating in regard to their hire or tenure of employment or the terms or conditions of employment.

WE WILL make whole Robert J. Davis and Joseph H. Harmon for any loss of pay suffered by them during the interval between the date they were laid off and the date they were discharged, and make whole John P. McKnight for any loss of pay he may have suffered, by reason of the discrimination against them.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join or assist any labor organization, to bargain

collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collectible bargaining or other mutual aid or protection or to refrain from any or all such activities.

BURNUP AND SIMS, INCORPORATED
(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Ross Building, 112 Case Street, Tampa 2, Florida, (Tel.: 223-4623) if they have any questions concerning this Notice or compliance with its provisions.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning

of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 712781 431

Office-Supreme Court, U.S.
FILED
DEC 23 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 15

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

BURNUP AND SIMS, INC.,
Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI,

FISHER & PHILLIPS,
Counsel for Burnup & Sims, Inc.,
26 Pryor Street, N. E.,
Atlanta 3, Georgia.

INDEX.

	Page
JURISDICTION	1
COUNTER-STATEMENT OF QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF FACTS	3
ARGUMENT IN OPPOSITION TO GRANT OF WRIT	4

AUTHORITIES CITED.

Cusano v. N.L.R.B., 190 F.2d 898 (C.A. 3)	6
Local 357, International Brotherhood of Teamsters, Chauffeurs and Warehousemen v. N.L.R.B., 365 U.S. 667, 680	5, 6
N.L.R.B. v. Cambria Clay Products Company, 215 F.2d 48 (C.A. 6)	6
N.L.R.B. v. Erie Resistor Corporation, 373 U.S. 221, 229, fn. 8	5
N.L.R.B. v. Industrial Cotton Mills, 208 F.2d 87 (C.A. 4)	6
N.L.R.B. v. Mackay Radio & Tel. Co., 304 U.S. 333	7

STATUTES.

National Labor Relations Act, as Amended, (61 Stat. 136, 29 U.S.C. 151, et seq.)	2

SUPREME COURT OF THE UNITED STATES.

October Term, 1963.

No. .....

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

BURNUP AND SIMS, INC.,
Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit.

BRIEF IN OPPOSITION TO PETITION.

Burnup and Sims, Inc., Respondent herein and below, respectfully files this Brief in opposition to the Petition for Writ of Certiorari filed by the National Labor Relations Board, Petitioner herein and below.

JURISDICTION OF THE PETITION FOR WRIT OF CERTIORARI.

The decision which Petitioner here seeks this Honorable Court to review arose from a petition for enforcement of an order of the National Labor Relations Board

filed by Petitioner with the Court of Appeals for the Fifth Circuit. The opinion of the Circuit Court is reported at 322 F.2d 57, and reproduced as Appendix A to the petition filed herein.

Jurisdiction is invoked pursuant to the provisions of 28 U.S.C. 1254 (1) and Section 10 (e) of the National Labor Relations Act, as amended. This Honorable Court has jurisdiction to review the decision entered herein by the Court of Appeals for the Fifth Circuit. However, we respectfully submit that an exercise of sound judicial discretion will deny review since the decision herein is not in conflict with any decision of this Court, does not decide issues not already decided by this Court and is not in conflict with the decision of any other court of appeals.

COUNTER-STATEMENT OF QUESTION PRESENTED.

Whether an employer, completely free from discriminatory motive, violates the National Labor Relations Act by discharging two employees it believes in good faith threatened to dynamite employer's property in the course of soliciting union membership.

STATUTE INVOLVED.

The question here presented is controlled by the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, et seq.).[1]

[1] "Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

* * * * *"

STATEMENT OF FACTS.

National Labor Relations Board, Petitioner, contests only the single issue posed by the following facts (Petition, p. 6, fn. 6):

Two employees, Davis and Harmon, while on lay-off status engaged in organizing activities in behalf of Local 172, Airline Supply Technicians, International Brotherhood of Teamsters, Chauffeurs & Warehousemen (R. 34). Contemporaneously with this activity, an employee of Respondent advised a Respondent manager that Davis and Harmon, while spoliciting him to sign a union card at his home had made threats against company property. According to the manager, the employee stated that Davis and Harmon warned that "if they didn't get their jobs back, if the union didn't get in, it would be fixed so no one could work;" by "using dynamite on the silos, the storage silos" (R. 41, J.A. 160, 180-181).

The Circuit Court found that Respondent in good faith believed that the threats alleged to have been made had in fact been made. Petitioner does not here dispute this finding.

Based on this belief, Respondent advised both Davis and Harmon by letter that because they "made or condoned serious threats to damage property of the company, should the union fail to win its election", they were being removed from lay-off status and terminated (R. 71; J.A. 195, 196). Neither Davis nor

Harmon responded to the letter and in fact issued no denial or other comment until they testified in the subsequent unfair labor practice hearing (R. 43; J.A. 32-37; 56-63). Prior to the receipt of the termination letters, Davis admitted having heard from Harmon that a "rumor" was going around among Respondent's employees that he had "made threats against the Company that (he) was using dynamite to blow up the sand silos" (J.A. 38).

The National Labor Relations Board, Petitioner, held that Respondent's termination of Davis and Harmon violated Section 8 (a)(3) and (1) of the Labor Management Relations Act, as amended. The Circuit Court of Appeals refused to enforce this finding and stated (322 F.2d at 62; Appendix A, Petition p. 21):

> "Here there was an honest belief that the employee had engaged in unprotected activity which warranted dismissal. The General Counsel cannot dispose of his burden by showing that the belief was erroneous; he must go further and show that the belief was not bona fide. The test for determining whether a discharge is wrongful under such circumstances as are presented by this case is the motive behind it."

ARGUMENT IN OPPOSITION TO GRANT OF WRIT.

Section 8 (a)(3) of the Labor Management Relations Act provides: "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term or condition of

employment to encourage or discourage membership in any labor organization . . .".

In *Local 357, International Brotherhood of Teamsters, Chauffeurs & Warehousemen v. N.L.R.B.*, 365 U.S. 667, 81 S.Ct. 835, this Court considered the elements necessary to the establishment of a violation of Section 8 (a)(3) of the Act. This Honorable Court stated:

> "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test." (365 U.S. at 675.)

This interpretation is emphasized in the concerning opinion of Mr. Justice Harlan which gives "explicit articulation" to "considerations . . . doubtless implicit" in the Court's opinion. The concurring opinion stated:

> "What, in my view, is wrong with the Board's position in these cases is that a mere showing of foreseeable encouragement of union status is not a sufficient basis for a finding of violation of the statute. It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities although the foreseeable effect of these decisions may be to discourage what the act protects." (365 U.S. at 679.)

Under the facts of the present case, the action taken by Respondent was not directed against protected activity and excused by a claim of "business exigencies". (*Cf. N.L.R.B. v. Erie Reststor Corp.*,

373 U.S. 221, 229, fn. 8.) To the contrary, the action here was directed solely against the alleged threat to dynamite. Petitioner, for the purpose of its Petition, concedes this (Petition, p. 6, fn. 6). Thus, there is in this case no unlawful motive.

Petitioner relies on *N.L.R.B. v. Industrial Cotton Mills*, 208 F.2d, 87 (CA 4), *N.L.R.B. v. Cambria Clay Products Company*, 215 F.2d 48 (CA 6) and *Cusano v. N.L.R.B.*, 190 F.2d 898 (CA 3) as the basis for alleging a conflict between circuit courts and as establishing a *per se* doctrine in the area of a Section 8 (a)(3) violation. That these cases do not stand for the proposition advanced by Petitioner appears from the concurring opinion in *Local 357, International Brotherhood of Teamsters, Chauffeurs & Warehousemen v. N.L.R.B., supra*, 365 U.S. 667, 680. Mr. Justice Harlan, with whom Mr. Justice Stewart joined, concurring, commented that the explanation for the fact that no finding of unlawful motivation was necessary in *Cusano v. N.L.R.B., supra*, and *N.L.R.B. v. Industrial Cotton Mills, supra*, was that there was an "absence of a significant business justification for the employers' acts". The case of *N.L.R.B. v. Cambria Clay Products Company, supra*, merely followed the holding in the *Industrial Cotton Mills* case.

Both the *Cambria Clay Products Company* case and the *Industrial Cotton Mills* case dealt with the obligation to reinstate unfair labor practice strikers who were refused reinstatement because of a mistaken belief that they had engaged in misconduct. The law is clear

that absent special circumstances, the strikers are entitled to their jobs back. (*N.L.R.B. v. Mackay Radio & Tel. Co.*, 304 U.S. 333.) Thus, in both cases, the General Counsel for the Board proved a prima facie case by showing that the strikers were not reinstated. The burden of showing an affirmative defense then devolved upon the respondents. In order to rebut the General Counsel's case, respondents had to affirmatively prove misconduct. Such a burden, we submit, was not upon the Respondent in the present case.

We submit that the decision of the Circuit Court in the present case is in full accord with the decisions of this Honorable Court. We further submit that the cases relied upon by Petitioner to support an allegation of conflict between circuit courts are inappropriate.

It is requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

FISHER & PHILLIPS,

By RAY C. MULLER and
JOHN BACHELLER, JR.

26 Pryor Street, N. E.,
Atlanta 3, Georgia.

CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that I mailed five (5) copies of the foregoing Brief In Opposition to Petition for Writ of Certiorari to the Honorable Archibald Cox, Solicitor General, Department of Justice, Washington 25, D.C., by United States first class mail, postage prepaid, this .... day of December, 1963.

JOHN BACHELLER, JR.,
Of Counsel.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Summary of argument	6
Argument	9
The Board properly held that respondent committed an unfair labor practice by mistakenly discharging employees for alleged misconduct committed in the course of protected activity	9
Introduction	9
A. The Board reasonably determined that the discharges in this case violated Section 8(a)(1)	14
B. The discharges here also violated Section 8(a)(3) of the Act	23
C. The Board's order was, in any event, proper in the particular circumstances of this case	31
Conclusion	34
Appendix	35

CITATIONS

Cases:

Allis-Chalmers Mfg. Co. v. *National Labor Relations Board*, 162 F. 2d 435	29
Associated Press v. *National Labor Relations Board*, 301 U.S. 103	10
Bonnar-Vawter, Inc., 129 NLRB 127	13
Cusano v. *National Labor Relations Board*, 190 F. 2d 898	14, 22, 29, 30

Cases—Continued

	Page
Fry Products, 110 NLRB 1000	13
Gaynor News Co. v. *National Labor Relations Board*, 347 U.S. 17	25, 27
International Ladies' Garment Workers' Union (Bernhard-Altmann) v. *National Labor Relations Board*, 366 U.S. 731	22, 30
Local 357, Teamsters Union v. *National Labor Relations Board*, 365 U.S. 667	16, 24, 27, 30
Local 833, United Automobile Workers v. *National Labor Relations Board and Kohler Co.*, 300 F. 2d 699, certiorari denied, 370 U.S. 911	34
Longview Furniture Co., 100 NLRB 301	13
Metal Blast, Inc., 139 NLRB 540	13
Mid-Continent Petroleum Corporation, 54 NLRB 912	12
National Labor Relations Board v. *Cambria Clay Products Co.*, 215 F. 2d 48	14
National Labor Relations Board v. *Dixie Shirt Co.*, 176 F. 2d 969	18
National Labor Relations Board v. *Erie Resistor Corp.*, 373 U.S. 221	16, 21, 25, 27, 30
National Labor Relations Board v. *Gluek Brewing Co.*, 144 F. 2d 847	29, 30
National Labor Relations Board v. *Hill & Hill Truck Line*, 266 F. 2d 883	10
National Labor Relations Board v. *Illinois Tool Works*, 153 F. 2d 811	14
National Labor Relations Board v. *Industrial Cotton Mills*, 208 F. 2d 87, certiorari denied 347 U.S. 935	14, 21, 22, 29, 30, 31
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1	10
National Labor Relations Board v. *Le Tourneau Co. of Georgia*, 324 U.S. 793	24

Cases—Continued

	Page
National Labor Relations Board v. *Miranda Fuel Co.*, 326 F. 2d 172	26
National Labor Relations Board v. *Thayer Company*, 213 F. 2d 748, certiorari denied, 348 U.S. 883	19, 34
National Labor Relations Board v. *Washington Aluminum Co.*, 370 U.S. 9	19
Patterson-Sargent Co., The, 115 NLRB 1627	13
Porto Rico Container Corp., 89 NLRB 1570	13
Radio Officers v. *National Labor Relations Board*, 347 U.S. 17	24, 25, 29
Republic Aviation Corp v. *National Labor Relations Board*, 324 U.S. 793	15, 24, 27
Rubin Brothers Footwear, Inc., 99 NLRB 610	13
Rubin Bros. Footwear v. *National Labor Relations Board*, 203 F. 2d 486	14
Simmons, Inc., 134 NLRB 1038	13
Standard Oil Company of California, 91 NLRB 783	12
Stewart Hog Ring Co., 131 NLRB 310	13

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 7	7, 11, 12, 21, 35
Section 8(a)(1)	4, 6, 8, 9, 14, 15, 23, 33, 35
Section 8(a)(2)	35
Section 8(a)(3)	7, 8, 9, 23, 24, 26, 28, 29, 35
Section 8(a)(5)	35
Section 10(c)	9, 18, 19, 33, 36
Section 13	21, 36

Miscellaneous:

1 Harper & James, *The Law of Torts*, p. 218	29
93 Cong. Rec. 6518, 2 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), 1593–1595	18

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 15

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BURNUP AND SIMS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 208–219) is reported at 322 F. 2d 57. The decision and order of the Board (R. 51–64, 28–41) are reported at 137 NLRB 766.

JURISDICTION

The decision of the court of appeals was rendered on August 22, 1963, and a decree was entered on November 14, 1963 (R. 208, 227–230). The petition for certiorari was filed on November 20, 1963, and granted on January 13, 1964 (R. 231). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. 160(e)).

QUESTION PRESENTED

Whether it is an unfair labor practice for an employer to discharge an employee engaged in solicitation for union membership because of a mistaken belief that the employee engaged in misconduct in the course of that union activity.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 35–36.

STATEMENT

This is an unfair labor practice proceeding arising from the layoff of three employees, Robert J. Davis, Joseph H. Harmon and John P. McKnight, and the subsequent discharge of two of them—Davis and Harmon. The facts found by the National Labor Relations Board are undisputed:

Respondent is engaged in Florida in the manufacture, sale and installation of concrete, concrete blocks, ready-mixed concrete and related products (R. 28–29). On September 21, 1961, a number of truckdrivers working at respondent's plant in Melbourne, Florida, staged a walkout in support of a demand for a wage increase. Employees Davis and Harmon were leaders of this action and McKnight was prominently involved. The men returned to work the same day (R. 51–52).

On the next day, September 22, Davis communicated with a local affiliate of the Teamster's Union,[1]

[1] Local Union No. 172, Airline Supply Technicians, affiliated with Internation Brotherhood of Teamsters (R. 29).

which undertook to attempt to organize the plant (R. 32–34). On September 29, 1961, Davis, Harmon and McKnight were laid off by respondent, allegedly because economic factors forced a cut-back in personnel (R. 52). Thereafter Davis and Harmon actively engaged in efforts on behalf of the Union to organize employees at the Melbourne plant. In the course of these activities, they both solicited employees at their homes (R. 59–60; 86; 92–93; 100–101).

On October 13 or 14, 1961, Tawney, the superintendent of the Melbourne plant, was told by an employee, named Pate, that Davis and Harmon had made threats against Company property while soliciting Pate, at Pate's home, to sign a union authorization card. Tawney reported the conversation with Pate to Moritz, respondent's Plant Manager (R. 34). On October 25, after talking with respondent's counsel, Pate gave respondent an affidavit describing the alleged solicitation by Davis and Harmon and stating that, "towards the end of the talk, Davis said: 'If the Union doesn't get in, we're going to use some dynamite to make sure that those who didn't vote for it won't work either; we'll blow the gravel bin over and make sure that no one works.' Harmon was right there at that time, but didn't add anything to Davis' statement." (R. 34–35.)

Respondent made no further investigation of Pate's charges (R. 59). On November 8, 1961, Moritz sent identical letters of discharge to Davis and Harmon, which read as follows (R. 35; 201; 202):

> When you were laid off on September 29, 1961, it was with the understanding that busi-

> ness in your particular job was slow and that you would have "first call" on any job that came available once business picked up.
>
> Business is now picking up, but I regret to advise you that I cannot re-employ you.
>
> It has come to my attention that you made or condoned serious threats to damage property of the company should the union fail to win its election. Under such circumstances I cannot re-employ you with our company.

McKnight, who was not discharged at this time, was subsequently taken back on the job and eventually discharged for good cause (R. 53, 58).

The Board concluded that the September 29 layoffs of Davis, Harmon and McKnight had been made in retaliation for their roles in the walkout and had constituted discriminations against the leaders of the walkout, thus violating Section 8(a)(1) of the National Labor Relations Act (R. 51–58). The Board also concluded that Sections 8(a) (1) and (3) of the Act had been violated by the November 8 discharges of Davis and Harmon. The Board found in this regard that Pate's allegations against Davis and Harmon, which had been the sole basis for the dismissals, were in fact untrue and that Davis and Harmon had actually made no threats against Company property in the course of soliciting Pate (R. 59–60).[2] The solicitation of Pate,

[2] The Board here relied on the categorical denials under oath of Davis and Harmon, on Pate's failure to testify, and on the absence of any other proof tending to establish the truth of Pate's charges (R. 60). The Trial Examiner had not reached the contrary conclusion (R. 40).

moreover, was a "protected activity" under the Act (R. 60–61). In these circumstances—that is, where discharges were based upon alleged employee misconduct taking place in the course of protected activity and where it affirmatively appeared that the misconduct did not, in fact, occur—the Board rejected the view that respondent's mere "honest belief" in the truth of the accusation against Davis and Harmon furnished a sufficient defense to the unfair labor practice charges. The Board held further that Pate's allegations had merely been a pretext for penalizing Davis and Harmon for their union activity (R. 60–61).[3] The Board's order required respondent, *inter alia,* to cease and desist from the unfair labor practices, to offer reinstatement to Davis and Harmon, and to make Davis, Harmon and McKnight whole for any loss of pay resulting from the discrimination against them.

On petition for enforcement of the Board's order, the court of appeals enforced the portion of the Board's order relating to the September 29 layoffs, holding that there was substantial evidence to support the Board's finding that the layoffs were discriminatorily motivated. (R. 209–210; 211; 219.) The court, however, declined to sustain the Board's finding that the discharges of Harmon and Davis had violated the

[3] The Board said that, in view of respondent's knowledge that Davis and Harmon had been engaged in a protected activity and in view of respondent's prior discriminatory layoff of Davis and Harmon, "we can only conclude that, because of their union activity, Respondent seized up their purported misconduct as an excuse to convert the layoffs of Davis and Harmon into discharges." (R. 61).

Act and it therefore refused enforcement of the remainder of the Board's order. (R. 213–219.) Although accepting the Board's finding that Davis and Harmon had not in fact engaged in misconduct, the court was of the view that a "good faith belief" that an employee has engaged in misconduct "is sufficient reason to discharge him no matter what the circumstances." (R. 217–218.) The court found further that the employer in this case had a "good faith" belief that Davis and Harmon had threatened to dynamite the plant and that the motivation for their discharges had been "to rid the plant of those from whom the threat was believed to have emanated." (R. 214.) The court thus rejected the Board's rule relating to mistaken discharges of employees engaged in protected activity. It also apparently overruled without discussion the Board's finding of fact that Pate's allegations had not been the real reason for the discharges, but had merely been a pretext for penalizing Davis and Harmon for their union activity (R. 61).

SUMMARY OF ARGUMENT

A. The Board's order in this case was a reasonable exercise of its power under Section 8(a)(1) of the National Labor Relations Act to prevent undue interference with employee freedom to engage in concerted activities. The rule which the Board seeks to have the Court sustain holds that a discharge is an unfair labor practice, despite the employer's "good faith," when the General Counsel demonstrates (1) that the discharged employee was known by the employer to have been engaging in protected union

activity, (2) that the reason for the discharge was an allegation that the employee committed an act of misconduct in the course of the protected activity, and (3) that, in fact, the employee was innocent of the alleged misconduct. It is easily demonstrated that, in the cases where this rule applies, the mistaken discharge of an employee for engaging in protected activity would be very likely to interfere with employee freedom to engage in collective activity. Although this fact alone would not justify the Board in holding such a discharge to be an unfair labor practice if the employer could point to business considerations which, on balance, were entitled to prevail over the employee rights involved, there is no strong legitimate employer interest in the narrow circumstances where the Board's rule applies. The rule is thus a proper accommodation of the competing interests. On the other hand, the view of the court of appeals that a "good faith belief" that an employee has engaged in misconduct "is sufficient reason to discharge him no matter what the circumstances" would encourage precipitous "good faith" discharges of employees engaged in protected activity and would thereby seriously impair the employee freedoms guaranteed in Section 7 of the Act.

B. The Board believes that its order in this case can also rest upon its power under Section 8(a)(3) of the Act to prevent "discrimination" which has the effect of discouraging union activity. The cases in which this Court has affirmed Board findings of violations of Section 8(a)(3) do not require the Board

to find that the employer was motivated either by a desire to discourage unionism or by a desire to treat union members differently from others. The cases do, however, contain a common thread which also runs through the present case: employees have been unjustifiably rewarded or penalized as a direct result of their participation in, or abstention from, union activity. The Board believes that this circumstance establishes a violation of Section 8(a)(3) here.

C. The Board's order may, in any event, be sustained on any of three alternative bases which are peculiar to this case. (1) Even if "good faith" were to be a sufficient defense to unfair labor practice charges growing out of mistaken discharges, the employer here was demonstrably not in "good faith." (2) The court of appeals below improperly overturned the Board's finding that the allegation of employee misconduct was merely a pretext for the discharges in this case. The Board properly found that the men here were actually discharged in retaliation for their union activity, thus clearly establishing violations of Sections 8(a) (1) and (3). (3) Even if no impropriety whatsoever had been connected with the *discharges* of the two men involved in this case, the Board's order reinstating them with back pay was proper as a remedy for respondent's prior action in laying them off to penalize them for union activity.

ARGUMENT

THE BOARD PROPERLY HELD THAT RESPONDENT COMMITTED AN UNFAIR LABOR PRACTICE BY MISTAKENLY DISCHARGING EMPLOYEES FOR ALLEGED MISCONDUCT COMMITTED IN THE COURSE OF PROTECTED ACTIVITY

INTRODUCTION

Although the National Labor Relations Act does not comprehensively regulate the conduct of employers in hiring and discharging their employees, it does subject the employment process to scrutiny in one important respect. However else an employer may wish to exercise his discretion in selecting employees, he must do it without unduly interfering with his employees' free choice to participate in collective activity. Section 8(a)(3) specifically makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(1) more generally makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," those rights being the rights "to self-organization" and "to form, join, or assist labor organizations." In enforcing these sections the Board is given power (Section 10(c)) to order "reinstatement of employees with or without back pay."

Typical cases arising under Sections 8(a)(3) and 8(a)(1) involve employees prominent in union activity who are discharged or laid off allegedly for causes unrelated to their union activity—for example, for malingering or for lacking capacity to do the job. In

such cases the Board ordinarily will determine whether the employer's motive in acting against the employee was the avowed good cause or whether the discharge was made in retaliation for the employee's union activity. In the latter event the Act is violated.[4] Another class of cases in which the same sections commonly come into play involves strikers who are discharged because of alleged strike misconduct—for example, for allegedly participating in an assault upon other employees while picketing the plant. Here, again, the Act is violated if the Board determines that the employer's actual motive in discharging a striker accused of misconduct was to penalize not the alleged misconduct, but the employee's participation in the strike.[5]

Cases of the type just described will ordinarily be satisfactorily disposed of in accordance with the Board's finding as to whether the employer was motivated by a desire to discriminate against union activity in effecting the discharge. There are discharge cases, however, in which the Board's power to protect the free exercise of employee rights under the Act would be inadequate if it were made to depend wholly upon a prior finding that the employer was motivated by anti-union bias. Suppose, for example, that an employee soliciting for the union in the plant is accused by a fellow employee of assault in the course

[4] See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46; *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 132.

[5] See *National Labor Relations Board* v. *Hill & Hill Truck Line*, 266 F. 2d 883, 887 (C.A. 5).

of the solicitation. The accused employee is thereupon fired. Suppose further that, despite the accusation, the accused employee was in fact innocent of the assault; he was the victim either of a malicious accusation or the case was one of mistaken identity. In such a situation, the Board may well find no positive evidence to demonstrate that the employer did not act on the basis of the false accusation. Nevertheless, if the discharge is permitted to stand, it may be just as effective as a conscious discrimination in repressing the free exercise by the remaining employees of their Section 7 rights. Those employees would be quite likely to conclude, despite the Board's ultimate failure to find deliberate anti-union bias, that the alleged "misconduct" was nothing but a pretext and that the discharge flowed directly from the employee's innocent engagement in union activity. Moreover, should an employer involved in a heated labor dispute realize that he can properly seize upon alleged misconduct to fire a union member engaged in protected activity regardless of whether the misconduct actually took place, a temptation would exist to act too swiftly upon unsupported allegations, thus further discouraging the free exercise of Section 7 rights.

Accordingly the Board has concluded through a series of decisions that, in limited circumstances, the Act permits it to find an unfair labor practice in a discharge case involving alleged misconduct without a prior explicit finding of anti-union motivation. The rule applies when employees are discharged for misconduct arising out of protected activity and when it is shown that the misconduct never in fact occurred;

in such cases the Board finds an unfair labor practice despite the employer's subjective "good faith." The rule thus places the risk of error upon employers in circumstances where mistaken discharges would be likely to have especially repressive effects upon the free exercise of Section 7 rights.

The Board's rule was first announced in *Mid-Continent Petroleum Corporation*, 54 NLRB 912, 932–934, where a large number of strikers were discharged for allegedly engaging in a sit-down in the plant. Eighteen of the men asserted that, in fact, they had not participated in the sit-down. The employer contended that, "even though it be established that these 18 strikers did not participate in the sit-down phase of the strike, nevertheless if the respondents [the employer], in good faith, believed that they did, and for this reason discharged them, their action in so doing was not violative of the Act." The Board rejected this contention, holding instead that, "[o]nce it is pleaded, as in the case here, that the discharge was made for unlawful conduct inseparably connected with the strike, the burden was on the respondents to show that all the striking employees discharged therefor had, in fact, been guilty of unlawful conduct * * *." The rule was reaffirmed in *Standard Oil Company of California*, 91 NLRB 783, 790–791, where the Board said that "[t]o hold otherwise would be to place employees who engage in lawful strike activities with the hope of returning to their jobs at the end of the economic struggle at the mercy of an employer who may sincerely regard their conduct as unlawful. * * * [A]n employer, who discharges a striker on the ground

that he has engaged in unlawful strike activities, does so at the peril of deciding wrongly." Subsequently, in *Rubin Brothers Footwear, Inc.*, 99 NLRB 610, the Board slightly modified the rule so as to make lighter the employer's burden of proof. Previous cases had placed an affirmative burden upon the employer to prove that the discharged employee was in fact guilty of the misconduct. In *Rubin Brothers, supra* at 611, the Board said that "[w]e are now of the opinion that the honest belief of an employer that striking employees have engaged in misconduct provides an adequate defense to a charge of discrimination in refusing to reinstate such employees, unless it *affirmatively* appears that such misconduct did not in fact occur. We thus hold that once such an honest belief is established, the General Counsel must go forward with evidence to prove that the employees did not, in fact, engage in such misconduct." [Emphasis in original.] Since *Rubin Brothers,* the rule has been applied by the Board in numerous cases, including those where the protected activity involved was activity other than a strike.[6]

In sum, the Board's view is that it has the authority to find that a discharge was an unfair labor practice, despite its failure affirmatively to find an anti-union motive for the discharge, where the Gen-

[6] See, *e.g.*, *Metal Blast, Inc.*, 139 NLRB 540, 541, 544–545; *Simmons, Inc.*, 134 NLRB 1038, 1053–1054; *Stewart Hog Ring Co.*, 131 NLRB 310, 313, 336; *Bonnar-Vawter, Inc.*, 129 NLRB 127, 138; *The Patterson-Sargent Co.*, 115 NLRB 1627, 1631, 1666, 1674–1675; *Fry Products*, 110 NLRB 1000, 1004; *Longview Furniture Co.*, 100 NLRB 301, 305; *Porto Rico Container Corp.*, 89 NLRB 1570, 1575–1576.

eral Counsel demonstrates (1) that an employee was fired who the employer knew was engaging in protected activity, (2) that the reason for the discharge was the allegation that he committed an act of misconduct in the course of that activity, and (3) that, in fact, the employee was not guilty of the alleged misconduct. The Board's rule has been upheld by the Courts of Appeals for the Third, Fourth and Sixth Circuits;[7] it has been rejected only by the Fifth Circuit, both on one prior occasion[8] and in the instant case.

A. *The Board reasonably determined that the discharges in this case violated Section 8(a)(1)*

The Board's order in this case was a proper exercise of its power under Section 8(a)(1) of the Act to prevent undue interference with employee freedom to engage in concerted activity. The initial inquiry where a violation of Section 8(a)(1) is charged is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7). The Board's rule in this case is a reasonable response to such potential interference.

---

[7] *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 902 (C.A. 3); *National Labor Relations Board* v. *Industrial Cotton Mills*, 208 F. 2d 87, 91 (C.A. 4), certiorari denied, 347 U.S. 935; *National Labor Relations Board* v. *Cambria Clay Products Co.*, 215 F. 2d 48, 53–54 (C.A. 6).

[8] *Rubin Bros. Footwear* v. *National Labor Relations Board*, 203 F. 2d 486 (Rives, J., dissenting).

When an employee is mistakenly discharged for alleged misconduct while engaging in protected activity, the effect upon the free exercise of employee rights is likely to be substantial—much more substantial than when a union member is routinely discharged for poor working performance. An employee who has been incorrectly discharged for engaging in protected activity would normally conclude that the union activity was the motivating cause of the discharge, while he would not be likely to give much credence to his employer's assertions that the discharge was motivated by misconduct which, as the employee knows, never occurred. Predictably, the discharged employee's fellow workers would accept his true version of the incident, rather than the employer's, and have a similar reaction. The Board was entitled to find that, as a result, employees would very likely be more hesitant to engage in future protected activity in a plant where one of their number has mistakenly been discharged for alleged misconduct committed in the course of protected activity. Even should some credence be given to the employer's claims of "good faith" in such cases, the Board could find that employees would nevertheless be deterred, for they would realize that, when they engage in union activity, they run the risk of losing their jobs not only if they actually engage in misconduct, but also if their employer is led to believe that misconduct occurred. Such a "good faith," but mistaken, employer belief is more than a theoretical risk, for union activity engenders strong emotions and active rumors, and the possibility of employer mistakes is substantial.

We recognize, of course, that a tendency to interfere with the free exercise of employee rights under

the Act is not the final test of illegality under Section 8(a)(1). In order to accommodate Section 8(a)(1) with other legitimate interests (see *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 797–798), employer action which actually tends to interfere with concerted activity is lawful if it can be shown both that the employer was innocent of anti-union bias and also that he was motivated by business considerations which, on balance, prevail over the employee rights involved. Cf. *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 228–229. In most cases an employer's interest in discharging employees who he believes are guilty of misconduct is properly deemed sufficient to outweigh any consequential interference with organizational activities. The rule at stake in this case, however, is confined to situations in which the alleged misconduct is inextricably entwined with concerted activities; indeed, the typical case of this kind is one in which the alleged misconduct was a mistake in the manner of conducting the concerted activities. In such cases, while the employer may be innocent of anti-union bias, his interest in preserving his mistaken decision is insufficient to justify the interference with employee freedom to engage in collective activity in the course of a labor dispute. See Mr. Justice Harlan, concurring in *Local 357, Teamsters Union* v. *National Labor Relations Board*, 365 U.S. 667, 677.

Moreover, the Board's rule, confined as it is to situations in which the alleged misconduct is part of the concerted activities, does not interfere with manage-

ment prerogatives as seriously as might initially appear. The cases in which the Board's rule applies are not cases where an employee has been fired for reasons which management is uniquely equipped to appraise, for example, where a union leader is an inefficient workman. In such a case the Board would defer to management's decision regarding the employee's efficiency and would find an unfair labor practice only if it found that the employer's anti-union bias, rather than the workman's inefficiency, was the motivating factor. Where questions of judgment closely touching the proper operation of the plant are thus involved, there is real value in permitting the employer to make an "honest" decision which is not subject to "second-guessing." In the cases to which the Board's rule applies, on the other hand, the discharge has turned not on any question of management's business judgment, but on a specific question of fact concerning the manner of carrying on union activity, *e.g.*, whether the employee, as in this case, made a particular threat against company property at a given time. The Board is at least as competent as the employer to decide this question, particularly where, as here, the employer has made no effort fully to investigate the facts. Once the Board has decided that the alleged threat did not occur, no compelling management interests are damaged by ordering reinstatement since the employer no longer has any legitimate reason to exclude the worker from the plant.[9] By rejecting the Board's

[9] In this case, the Board awarded the discharged employees both reinstatement and back pay. We do not suggest, however, that the Board would necessarily be obliged to grant the same

rule, the court of appeals would, however, give the employer the final say as to whether an act of misconduct actually occurred, even though the employer failed to make a thorough investigation, even though there is no longer any good reason to exclude the employee from the plant and even though the employer's mistaken action would be likely to have a serious impact on the exercise of employee rights.[10]

---

remedy in every case. Under Section 10(c) of the Act, it has considerable discretion with regard to the remedy to be imposed. In considering whether back pay as well as reinstatement should be awarded it could, for example, take into account in an appropriate case the fact that the employer acted only after a careful investigation. The Board was not called upon to exercise such discretion in this case, for it legitimately found that respondent had acted both precipitously and for an improper motive. See *infra*, pp. 31–34.

[10] This analysis does not overlook the provision in Section 10(c) of the Act that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." The fact that a threat to dynamite the plant would ordinarily justify a discharge and that such threat was the asserted reason for respondent's action does not necessarily make its action "for cause" within the meaning of Section 10(c). The legislative history of the provision, which was added to the Act in the Taft-Hartley amendments of 1947, shows that it was intended merely to emphasize the principle that, if an employee was indeed discharged for good cause, he was not to be reinstated or awarded back pay. The provision did not attempt to define "good cause" but recognized "the existing provision of law" which left it to the Board, on the facts of each case, to determine whether the cause assigned in fact existed or was legally sufficient. See 93 Cong. Rec. 6518, 2 Leg. Hist. of the Labor-Management Relations Act, 1947 (G.P.O., 1948), 1593–1595; *National Labor Relations Board* v. *Dixie Shirt Co.*, 176 F. 2d 969, 974 (C.A. 4). What constitutes "cause" is thus not left wholly in the employer's discretion, but turns on the Board's reasonable judgment in

Consider, moreover, the consequences should the Board be compelled to adopt the position affirmatively advanced by the court of appeals, namely, that a "good faith belief" that an employee has engaged in misconduct in the course of a protected activity "is sufficient reason to discharge him no matter what the circumstances" (R. 217–218). The court below found that the employer here was in "good faith" when he accepted the unsupported allegation of Pate that Davis and Harmon had threatened to dynamite the plant and thereupon fired Davis and Harmon without engaging in further investigation. If, as the court held, such employer conduct were sufficient to immunize the employer from unfair labor practice charges in the absence of an affirmative Board finding of anti-union motivation, an enormous temptation would be

---

light of the circumstances. See *National Labor Relations Board* v. *Thayer Company*, 213 F. 2d 748, 753, n. 6 (C.A. 1), certiorari denied, 348 U.S. 883. In the present case, the Board has determined, for the valid reasons set forth above, that, when an employer mistakenly discharges an employee for non-existent misconduct in the course of a protected activity, there is insufficient justification for the resultant invasion of employee rights which would occur. There is thus no "cause" within the meaning of Section 10(c). As the Court pointed out in *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9, 17, in rejecting the contention that a discharge in violation of a plant rule was "for cause" and thus privileged under Section 10(c):

"* * * But this, of course, cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which § 7 of the Act protects. And the plant rule in question here purports to permit the company to do just that for it would prohibit even the most plainly protected kinds of concerted work stoppages until and unless the permission of the company's foreman was obtained."

placed in the way of employers involved in labor disputes to seize upon rumors of alleged misconduct by union leaders engaged in protected activity as a pretext for their discharge. The danger of successful pretexts would simply be too great if the Board's power thus turned inexorably upon findings of subjective "good faith." In these circumstances the Board justifiably insists that the legality of a discharge turn not upon subjective "good faith" but upon whether the discharge was, in fact, based upon actual misconduct."

In short, to discharge an employee under the good faith, but mistaken, belief that conduct occurred in the course of union activity which deprived it of its protected character tends seriously to interfere with the exercise of that activity, and any business justification which exists for privileging such interference

[11] This is not to say that other alternatives were not potentially available to the Board in dealing with these cases. For example, the Board might conceivably have continued to attempt to rely solely upon affirmative findings that employers were, in fact, motivated by anti-union bias. The very fact that the employee was actually engaged in concerted activities at the time of the alleged misconduct would naturally tend to make one more skeptical of motives. In many cases, however, there might simply be no evidence to support such an affirmative finding; it would simply be a guess. Alternatively, the Board might conceivably have relied instead upon its ability to scrutinize assertions of "good faith" and to evolve principles under which precipitous employer action or action taken after inadequate investigation—as in this case—would not qualify as action taken in "good faith." The question before the Court, however, is not whether other approaches may have been available to the Board, but whether the approach actually adopted is a reasonable accommodation of the conflicting interests in light of the statutory policy. We submit that the Board's rule is such a reasonable accommodation.

is far outweighed by the competing employee interests. As the Fourth Circuit stated in *National Labor Relations Board* v. *Industrial Cotton Mills*, 208 F. 2d 87, 91, certiorari denied, 347 U.S. 935: [12]

> * * * the employee is harmed whether the denial of reinstatement results from the employer's mistake or from his blameworthy animus. In either case, the striker has nevertheless lost his job.
>
> It is true where denial of reinstatement results from the employer's reasonable and sincere mistake, there is no evil intention behind the harm suffered by the employee. While the employer's attitude may not be censurable, the employee too is free of blame. As between the victim of the mistake and the person who made the mistake, it seems just that the perpetrator bear the onus of his own error rather than that the burden of this error should be shifted to the employee who cannot guard against it. * * *

In protecting the right to strike and to engage in concerted activity, in Sections 7 and 13 of the Act, Congress intended to afford employees a firm guarantee.[13] Under the holding of the court below, the

[12] In *Industrial Cotton*, the employer denied reinstatement to an unreplaced economic striker under the good faith, but mistaken, belief that he had thrown tacks on the street in front of the plant. The Fourth Circuit, accepting the Board's finding that this striker was innocent of the misconduct, agreed that the denial of reinstatement was violative of Sections 8(a) (1) and (3) of the Act, irrespective of the employer's good motive.

[13] This Court has only recently reemphasized Congress' repeated solicitude for the right to strike. *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 233–235.

statutory protection would not be such "a firm and clear guarantee" but "one which constantly varies with the correctness of the employer's opinion or with accuracy of his sources of information." *Industrial Cotton Mills, supra,* 208 F. 2d at 91. This view would materially weaken the guarantees of the Act, for the extent of employees' protected rights would be made to vary with the state of the employer's mind." *Cusano* v. *National Labor Relations Board,* 190 F. 2d 898, 902 (C.A. 3).[14]

Finally, the Board's approach is in keeping with the interpretation given the Act in related situations. In *International Ladies' Garment Workers Union (Bernhard-Altmann)* v. *National Labor Relations Board,* 366 U.S. 731, this Court held that the employer violated Sections 8(a) (1) and (2) of the Act by according exclusive recognition to, and entering into a contract with, a union at a time when it represented only a minority of the employees, rejecting the contention that the action was excused by the employer's good faith belief that the union represented a majority. In words equally applicable here, the Court stated (pp. 738–739):

> The petitioner, while taking no issue with the fact of its minority status on the critical date, maintains that both Bernard-Altmann's and its own good-faith beliefs in petitioner's

[14] In *Cusano*, the Third Circuit, in agreement with the Board, held that the employer violated the Act by discharging an employee under an honest, but erroneous, belief that he had deliberately lied about the extent of the employer's profits in reporting to a union committee about preparation for a Board election.

majority status is a complete defense. To countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives. We find nothing in the statutory language prescribing *scienter* as an element of the unfair labor practices here involved. The act made unlawful by Section 8(a)(2) is employer support of a minority union. Here that support is an accomplished fact. More need not be shown, for, even if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith. [Footnotes omitted.]

B. *The discharges here also violated Section 8(a)(3) of the Act*

The Board believes that the discharges of employees Davis and Harmon in this case may also be viewed as a violation of Section 8(a)(3) of the Act, which makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization." In stating this alternative argument, we note that, in the circumstances of this case, all elements which would be required, on the Board's theory, to make out a violation of Section 8(a)(3) would also establish a plain breach of Section 8(a)(1).

There are two elements to the offense of violating Section 8(a)(3): (1) an unpermitted "discrimination"; and (2) resulting unjustifiable encouragement or discouragement of union membership. *Radio Officers* v. *National Labor Relations Board*, 347 U.S. 17, 42–43; *Local 357, Teamsters Union* v. *National Labor Relations Board*, 365 U.S. 667, 674–676. As shown in the preceding portion of this brief, the second element—unjustifiably discouraging union activity—was clearly present here. The Board submits that it could reasonably find that discrimination within the meaning of this section was likewise present.

As we have noted, the typical case in which Section 8(a)(3) comes into play is one where the employer asserts that he discharged an employee for poor work while the employee alleges that he was discharged because of union activity. In this situation, the Board will ascertain the "real motive" for the employer's action. If the Board finds that the employer based his action on the employee's union activity, it is easy to conclude that the requisite impermissible "discrimination" was present: The employer singled out the discharged employee *because of* the employee's union affiliation, and it is a fair inference that he also acted *in order to discourage* union activity.

The Court, however, has also sustained findings of "discrimination" under Section 8(a)(3) in cases where neither of these motivational elements was present. In *Republic Aviation Corp.* v. *National Labor Relations Board*, and *National Labor Relations Board* v. *Le Tourneau Co. of Georgia*, 324 U.S. 793, 795, 797, employees distributing union literature at

two plants were discharged for violating company rules which prohibited soliciting of any type in the plants. The Board found in both cases that the discharges were made in pursuance of unbiased enforcement of the no-solicitation rules, without discrimination on the part of the employer toward union activity. The no-solicitation rules themselves had not been adopted to deal with union activity but were motivated by broader business considerations. Nevertheless, the Court held that the Board was justified in finding violations of Section 8(a)(3) in both cases. In *Gaynor News Co.* v. *National Labor Relations Board*, 347 U.S. 17, 36, 37, decided in the same opinion with *Radio Officers* v. *National Labor Relations Board, supra*, the employer granted retroactive wage increases to union members but withheld the same benefits from other employees in the unit who were not members of the union because "it was not contractually bound to do so, and, in its business judgment, did not choose to do so." The employer "acted from self-interest and not to encourage unionism," and there was some basis for the employer's belief that he was contractually bound to pay the benefits to union members and no one else. The Court again affirmed a finding that Section 8(a)(3) had been violated. In *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, the employer granted superseniority benefits to replacements for strikers and to strikers who were willing to abandon the strike and resume work. The employer asserted, and the Board did not find otherwise, that its purpose was not to penalize the strikers

but to keep the plant operating. Nevertheless, the Court held that Section 8(a)(3) was violated.

The concept of "discrimination" within the meaning of Section 8(a)(3) is therefore not readily susceptible of abstract definition. The foregoing cases establish that the Act does not prohibit only discrimination *in order to discourage or encourage* unionism; it is sufficient if the discrimination has the effect or potentiality to discourage or encourage union activity without being designed to do so. They also establish that "discrimination" need not necessarily be *on the basis* of union activity—*i.e.*, union activity need not be the motivating reason for different treatment. The words of the Act alone are of little help, for while they broadly prohibit an employer "by discrimination" "to encourage or discourage membership in any labor organization," they do not describe which reasons for acting differently toward some employees constitute "discrimination" and which do not.[12]

One thread which does run through the foregoing cases in this Court, which is also contained in the present case, is that employees have been rewarded or penalized *as a direct result of their participation in*

[12] In a recent case, Judge Friendly has suggested (*National Labor Relations Board* v. *Miranda Fuel Co.*, 326 F. 2d 172, 180, 181 (dissenting opinion)) that "discrimination" within the meaning of Section 8(a)(3) may well mean "to distinguish or differentiate without sufficient reason." An employer would thus violate Section 8(a)(3) when he singles out an employee or group of employees for special treatment with no reason or with reasons found insufficient by the Board, with the consequent result of discouraging union activity. Such an approach would lead to a finding of discrimination in this case.

or abstention from protected union activity.[16] In *Republic Aviation, supra,* for example, the employer acted merely to preserve its broad no-solicitation rule, but the result was that employees were fired as the direct consequence of their engaging in protected union solicitation. In *Gaynor News Co., supra,* and *Erie Resistor, supra,* benefits and disabilities also flowed to employees, regardless of their employers' motives, as the direct result of their engaging in or refraining from union activity. In the present case, if threats of violence had actually been made, it could not be said that Davis and Harmon were fired as a direct consequence of protected union activity, for the threats would have made their solicitation unprotected. However, since there were no threats in fact, Davis and Harmon were indeed fired, as in *Republic Aviation,* as a consequence of their engaging in protected union solicitation.[17]

[16] *Local 357, supra,* is not to the contrary. There the union and employer had an agreement requiring the employer to hire exclusively through hiring halls operated by the union. A union member obtained employment independently of the hiring hall and he was, for that reason, discharged. The Board found violations of Sections 8(a)(1) and (3) on the ground that the hiring-hall agreement was *per se* unlawful. The Court reversed, holding that an exclusive hiring-hall agreement between an employer and a union was not *per se* unlawful under the Act. Since the employee therefore did not have a protected right to obtain employment free of such a hiring procedure, he was not discharged as a result of his participation in protected activity.

[17] The principal remaining factual difference between *Republic Aviation, Gaynor News* and *Erie Resistor* on the one hand, and the present case on the other, is that in this case the employer acted on the basis of factual assumptions which were mistaken but which, if true, would have immunized his conduct from unfair labor practice charges. For the reasons set forth, the Board submits that this difference is irrelevant here.

As we have shown, pp. 11, 14–15, *supra*, where employees are thus fired as the direct result of their participation in protected activity, many of the industrial consequences of deliberate anti-union discrimination are present. For example, from the point of view of the discharged employee, he has been punished for merely engaging in protected activity, and, whatever the employer's subjective motivation, it will be natural for the employee to conclude that he was discriminated against *because of* that activity and to react accordingly. The impact upon fellow employees of the discharged worker would be similar. Nor in such cases is there any way to be certain that the employer would have viewed the alleged misconduct as seriously if it had not taken place in the course of protected activity.

Therefore, the Board submits that this Court's prior decisions respond to the industrial realities and permit the Board to act under Section 8(a)(3) where, because the discharges flowed directly from participation in or abstention from protected union activity, the effects of the employer's actions are comparable to those present in cases characterized by conscious anti-union bias. In the present case, where employees were unjustifiably fired for conduct which was alleged to take place in the course of protected activity, the Board believes that the nexus between the cause of the discharge and union activity was sufficient to satisfy the Act.[18]

---

[18] Since the employer here knew that the alleged misconduct occurred in the course of union activity, the Board submits that

The conclusion that the Board's power to find violations of Section 8(a)(3) thus extends to this case is confirmed by this Court's frequent citation, in connection with its discussions of Section 8(a)(3), of *National Labor Relations Board* v. *Industrial Cotton Mills, supra,* and *Cusano* v. *National Labor Relations Board, supra,* where the Board applied the same rule involved in this case. Thus in *Radio Officers, supra,* the Court cited those two cases in support of the proposition that both "the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement" of Section 8(a)(3) without "specific evidence of intent to en-

---

it may also be said that he "intended" to intrude into that activity, albeit under the mistaken belief that it had become unprotected. An analogy is suggested by cases where one charged with an intentional tort, such as battery, defends his conduct by showing that he was acting under a misapprehension as to some fact, such as the identity of the victim, which caused him to believe that he had a right to act as he did. The courts have uniformly rejected this defense. See 1 Harper & James, *The Law of Torts*, p. 218:

"It has been seen that to constitute a battery a defendant's conduct must be characterized by the factor of intent. But it is necessary to analyze the mental element more minutely. All that is necessary is (a) that the actor engage in volitional activity and (b) that he intend to violate the legally protected interest of another in his person. The distinction is at once drawn between accident and mistake. If the actor intends to inflict a harmful or offensive contact on the plaintiff, it is no defense that he does so under a mistaken belief as to the plaintiff's identity, or in the belief that he is privileged to do so. Since he intends the invasion of another's interest, he takes the risk of the existence of a legal privilege to make it; it is no defense that the mistake is reasonable and due to no fault or negligence on the part of the actor. As in other cases of mistake, he must bear the losses incident thereto * * *." [Footnotes omitted.]

courage or discourage" (347 U.S. at 44–45, n. 53).[19] In *Local 337, Teamsters Union, supra,* Mr. Justice Harlan, in his concurring opinion, cited *Cusano* and *Industrial Cotton* as an exception to the general rule that "an affirmative showing of a *motivation* of encouraging or discouraging union status or activity" is required to establish a violation of Section 8(a)(3), and explained that the "absence of a significant business justification for the employer's acts which tended to discourage union activity explains the dispensability of proof of discriminatory motivation" in those cases (365 U.S. 667, 678). And, in *Erie Resistor, supra,* the Court, after pointing out that conduct which is inherently discriminatory may be found unlawful despite the employer's "good" motive, cited, *inter*

[19] The Court also cited *Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board*, 162 F. 2d 435 (C.A. 7); and *National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847 (C.A. 8). *Allis-Chalmers* involved a situation where, after a union had been selected for a bargaining unit consisting of rank-and-file employees and inspectors, the employer, allegedly motivated by the consideration that inclusion of inspectors in the same bargaining unit would have an adverse effect on production, reclassified the inspectors' jobs and limited their functions; the Board found and the court agreed that the employer's alteration of the bargaining unit was violative of Sections 8(a) (1) and (3) of the Act notwithstanding his asserted business justification. *Gluek Brewing* involved a situation where the employer, motivated by a desire to avoid a disruption and loss of business threatened by the Teamsters, discharged his own drivers, represented by the Brewers, and subcontracted out the trucking operation to a company represented by the Teamsters; the Board found and the court agreed that the employer's action was violative of Sections 8(a) (1) and (3) notwithstanding his business justification.

alia, Cusano and *Industrial Cotton* (373 U.S. at 229, n. 8).[20]

C. *The Board's order was, in any event, proper in the particular circumstances of this case*

We have shown that the Board's order in this case was correct as an application of the principle that, regardless of the employer's "good faith," it is an unfair labor practice mistakenly to discharge an employee for alleged misconduct occurring in the course of protected activity. It is appropriate, in addition, to present briefly three alternative bases, peculiar to this case, upon which the Board's order should, in any event, be sustained.

1. Even if, as the court of appeals held, employer "good faith" is a complete defense to unfair labor practice charges growing out of mistaken discharges, the facts accepted as true by the court of appeals in this case would not, under any proper view, constitute "good faith." The court of appeals assumed that respondent's motivation for discharging Davis and Harmon was its "honest belief," based solely upon Pate's allegations, that the men had threatened to dynamite company property; "the intent was to rid the plant of those from whom the threat was

[20] See, also, *International Ladies' Garment Workers' Union (Bernhard-Altmann)* v. *National Labor Relations Board*, 366 U.S. 731 (pp. 22–23, *supra*), where the Court, in rejecting the contention that the employer's action in according exclusive recognition to a minority union was not excused by his good faith, but mistaken, belief that the union represented a majority, stated that, "prohibited conduct cannot be excused by a showing of good faith," citing, *inter alia*, *Industrial Cotton* (*id.*, at 739, n. 12).

believed to have emanated." (R. 214.) Even if those were the facts—and we submit, *infra*, that they were not—the conclusion of "good faith" was unwarranted. "Good faith" in such a situation would require, at least, some investigation of the charges. An "honest belief" alone, based upon no real attempt to find the truth, will not suffice. Yet respondent made no attempt to go beyond Pate's story. Neither Davis nor Harmon was interviewed before his discharge nor given opportunity to answer the charges against him. Moreover, Pate's two separate versions of the incident were inconsistent in a vital respect: At first he orally attributed the threatening remarks to Harmon; in a subsequent signed statement, after an interview with respondent's counsel, he attributed the remarks to Davis. (R. 210.) In these circumstances, respondent cannot claim a "good faith" exemption without a more serious effort to ascertain the truth before taking action.

2. The court of appeals erred in assuming that respondent's "motivation was the belief that men had threatened to dynamite property; the intent was to rid the plant of those from whom the threat was believed to have emanated." (R. 214.) This assumption was directly contrary to the Board's finding of fact that the allegations of misconduct were merely a pretext for discharging the men because of their union activity. The Board found:

> It is undisputed, and Respondent knew, that the alleged misconduct was asserted to have taken place while Davis and Harmon were engaged in protected union activity, the solicitation of union membership and authorization

> cards. In view of this knowledge and in view of the fact that these employees were laid off discriminatorily because of Respondent's desire to rid itself of employees who it knew were leaders in the protected concerted activity, *we can only conclude that, because of their union activity, Respondent seized up their purported misconduct as an excuse to convert the layoffs of Davis and Harmon into discharges.* [Emphasis added.] (R. 61.)

The court made no attempt to explain its departure from the Board's findings. The Board's conclusions seem to have been supported by ample evidence, to wit, the Board's conclusions (i) that respondent had, shortly before, discriminatorily laid off Davis and Harmon for their union activity and (ii) that respondent had acted upon Pate's unsupported allegations without any attempt at further investigation. In any event, the court acted improperly in rejecting the Board's factual conclusions without reasons to support its action.

3. As noted in the previous paragraph, the Board found, and the court of appeals agreed, that, shortly prior to discharging these employees, respondent had violated Section 8(a)(1) of the Act by laying off Davis, Harmon and McKnight because of their leadership in concerted activity to obtain a wage increase. Respondent's discharges of Davis and Harmon came while those two employees were still in lay-off status. Even if no impropriety had been connected with the discharges when viewed in isolation, the Board would nevertheless have been entitled to order the reinstatement with back pay of

Davis and Harmon as a remedy for their previous discriminatory layoffs. Regardless of the effect of employer "good faith" mistakes in other circumstances, the Board, as an exercise of its remedial power under Section 10(c), is entitled to insist that such improperly laid-off employees be reinstated unless they actually engage in misconduct. Compare *National Labor Relations Board* v. *Thayer Company*, 213 F. 2d 748, 753 (C.A. 1), certiorari denied, 348 U.S. 883; *Local 833, United Automobile Workers* v. *National Labor Relations Board and Kohler Co.*, 300 F. 2d 699, 702–704 (C.A.D.C.) certiorari denied, 370 U.S. 911.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case remanded with directions to enforce the Board's order in full.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
PAUL BENDER,
Assistant to the Solicitor General.
ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LAURENCE S. GOLD,
Attorney,
National Labor Relations Board.

AUGUST 1964.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *

SEC. 10. * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

* * * * *

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

U.S. GOVERNMENT PRINTING OFFICE:1964

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 24 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1964.

No. 15

NATIONAL LABOR RELATIONS BOARD,

versus

BURNUP AND SIMS, INC.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

ERLE PHILLIPS,
26 Pryor Street, N.E.,
Atlanta, Georgia 30303,
GEOFFREY B. DOBSON,
26 Pryor Street, N.E.,
Atlanta, Georgia 30303,
Attorneys for Respondent.

INDEX.

	Page
STATUTE INVOLVED	1
QUESTION PRESENTED	2
STATEMENT	2
SUMMARY OF ARGUMENT	4
ARGUMENT	7
Point I. The question of good faith or of the power of the Board to order reinstatement as a remedy for a layoff in spite of a lawful discharge is not before this court	7
Point II. The Court of Appeals properly held that where an employee is discharged as a result of a good faith but mistaken belief of the employer that the employee has engaged in misconduct, no violation of Section 8 (a)(3) has taken place	10
A. Motive is an essential element of a violation of Section 8 (a)(3)	10
B. The rule of mistaken belief applied in cases involving the reinstatement of strikes is inapplicable to the present situation	15

INDEX—(Continued):

Page

ARGUMENT—(Continued):

Point III. A discharge based on a good faith but mistaken belief that an employee has engaged in misconduct does not constitute a violation of Section 8 (a)(1) 19

A. The Board's finding of a Section 8 (a)(1) violation interferes with respondent's right to make a reasonable business judgment 19

B. The Board exceeded its power to draw reasonable inferences in finding a violation of Section 8 (a)(1) 22

Point IV. There is an industrial right of self-defense 24

CONCLUSION 26

APPENDIX 29

CITATIONS.

Cases:

Allis-Chalmers Mfg. Co. v. National Labor Relations Board, 162 F.2d 437 (7th Cir., 1947) 11

Associated Press v. National Labor Relations Board, 301 U.S. 103 (1937) 19

Bonnar-Vawter, Inc., 129 NLRB 127 (1960), affirmed 289 F.2d 133 (1st Cir., 1961) 16

Cusano v. National Labor Relations Board, 190 F.2d 898 (3rd Cir., 1951) 15, 16

CITATIONS—(Continued):

Page

Cases—(Continued):

J. I. Case Co. v. Borak, ... U.S. ...., 12 L.ed. 2d 423 (1964) 10

Local 357, I. B. of T.,C.,W. & H. v. National Labor Relations Board, 365 U.S. 667 (1961) ..10, 12, 22

Midcontinent Petroleum Co., 54 N.L.R.B. 912 (1944) 17

Namet v. United States, 373 U.S. 179 (1963) 10

National Labor Relations Board v. Adkins Transfer Co., 226 F.2d 324 (6th Cir., 1955) 11

National Labor Relations Board v. Condenser Corp., 128 F.2d 67 (3rd Cir., 1942) 11

National Labor Relations Board v. Erie Resister Corp., 373 U.S. 221 (1963) 12, 16, 18

National Labor Relations Board v. Industrial Cotton Mills, 208 F.2d 87 (4th Cir., 1953) 15, 16, 17

National Labor Relations Board v. Illinois Tool Works, 153 F.2d 811 (7th Cir., 1946) 21

National Labor Relations Board v. James Thompson & Co., 208 F.2d 743 (2nd Cir., 1953) .. 14

National Labor Relations Board v. John S. Swift Company, 277 F.2d 641 (7th Cir., 1960) .. 15

National Labor Relations Board v. Kaye, 272 F.2d 112 (7th Cir., 1959) 15

National Labor Relations Board v. McCatron, 216 F.2d 212 (9th Cir., 1954) cert. denied 348 U.S. 943 .....21, 23, 24

National Labor Relations Board v. McGahey, 233 F.2d 406 (5th Cir., 1956) 11

National Labor Relations Board v. Mylon-Sparta Co., 166 F.2d 485 (6th Cir., 1948) 20

CITATIONS—(Continued):

Page

Cases—(Continued):

National Labor Relations Board v. Prince Macaroni Manufacturing Co., 329 F.2d 803 (1st Cir., 1964) 15

National Labor Relations Board v. Ray Smith Transport Co., 193 F.2d 142 (5th Cir., 1951) 23

National Labor Relations Board v. Standard Coil Products Co., 224 F.2d 465 (1st Cir., 1955), cert. denied 350 U.S. 902 11

National Labor Relations Board v. Truck Drivers Local Union, 353 U.S. 87 (1957) 25

National Labor Relations Board v. United Parcel Service, Inc., 317 F.2d 912 (1st Cir., 1963) .11, 20

Radio Officers' Union, etc. v. National Labor Relations Board, 347 U.S. 17 (1954) 10, 12, 23

Rapid Roller Co. v. National Labor Relations Board, 126 F.2d 452 (7th Cir., 1942), cert. denied 317 U.S. 650 21

Raytheon Company v. National Labor Relations Board, 326 F.2d 471 (1st Cir., 1964) 14

Republic Aviation Corp. v. National Labor Relations Board, 324 U.S. 793 (1945) 12

Rubin Bros. Footwear v. National Labor Relations Board, 203 F.2d 486 (5th Cir., 1953) 15, 20

Trailmobile Co. v. Whirls, 331 U.S. 40 (1947) .. 8

Underwood Machinery Co., 74 N.L.R.B. 641 (1947), affirmed 179 F.2d 118 (1st Cir., 1949) 11, 17

Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951) 14

CITATIONS—(Continued):

Page

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.):

Section 2 (3) 5, 15, 18
Section 7 19
Section 8 (a)(1) 6, 13, 19, 21, 22, 24
Section 8 (a)(3) 5, 6, 10, 14, 15, 18, 23
Section 10 (c) 9
Section 13 ..... 5, 15, 16, 18

Florida Statutes § 790.162 (1963) 18

Miscellaneous:

An American Legal Dilemma—Proof of Discrimination, 17 University of Chicago Law Review, 107, 109 11

1 Harper & James, The Law of Torts, 239 25

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1964.

No. 15.

NATIONAL LABOR RELATIONS BOARD,

versus

BURNUP AND SIMS, INC.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, p. 29.

QUESTION PRESENTED.

Whether an employer, completely free from discriminatory motive, violates the National Labor Rela-

tions Act by discharging two employees it believed in good faith threatened to dynamite employer's property in the course of soliciting union membership.

STATEMENT.

The question here presented arises out of the discharge of two employees, Robert J. Davis and Joseph H. Harmon, who were on layoff status [R. 82]. During the period in which they were laid off, both Davis and Harmon engaged in organizing activities [R. 92, 100]. During this time another employee, Lyle Pate, came to Doyle Tawney, General Superintendent for the Employer, and told Tawney that two men had told him they would dynamite the Employer's storage silos [R. 190]. Pate identified them as Davis and Harmon [R. 191]. At that time he stated that Harmon had made the actual threat [R. 192]. Mr. Tawney then related the incident to Mr. Moritz [R. 192], the man in charge of the Employer's operations at the particular plant [R. 135].

Some time later when the Employer's lawyer, Mr. Muller, was present, Pate was called into the office where a statement was taken down [R. 193]. This statement alleged that Davis and Harmon had come to Pate's trailer to talk to him about the union. At about the end of the talk Davis allegedly said:

> "If the union doesn't get in, we're going to use some dynamite to make sure that those who didn't vote for it won't work either; we'll blow the gravel bins over and make sure that no one works." [R. 206]

Tawney then took Pate and had the statement notarized [R. 177].

Previously, only several days before he had been laid off, Harmon had helped in setting off dynamite in one of the trucks to blast out concrete. This entailed drilling, placing the charge, pinning it, and setting the charge off. Harmon had volunteered to assist in this project [R. 104].

In the meantime, both Harmon and Davis had learned that it was alleged that they had threatened to destroy company property. In the case of Davis, he had "heard men talking about it." Among these was Joe Harmon who told Davis, "I heard a rumor that you're going to blow up the Company" [R. 91]. In addition, John McKnight, another employee who was on layoff status [R. 82], told him that someone had signed an affidavit to the effect that he, Davis, had made a serious threat against the Company [R. 92]. In the case of Harmon, a government lawyer told him that he had been accused of making or condoning the threats [R. 109].

Following the events just narrated, the Company sent both Harmon and Davis letters discharging them. The letters advised each:

> "When you were laid off on September 29, 1961, it was with the understanding that business in your particular job was slow and that you would have 'first call' on any job that came available once business picked up.

"Business is now picking up, but I regret to advise you that I cannot re-employ you.

"It has come to my attention that you made or condoned serious threats to damage property of the Company should the Union fail to win its election. Under such circumstances, I cannot re-employ you with our Company." [R. 201, 202]

Neither Davis or Harmon answered the letter or attempted to communicate with the Company [R. 88, 105]. In the meantime, McKnight was rehired [R. 131] and given a new truck [R. 196].

Moritz testified that he did not re-employ Davis and Harmon because of the serious threats [R. 131]. Both the Trial Examiner and the Court of Appeals so found [R. 40, 212-213].

SUMMARY OF ARGUMENT.

I. The Board in its brief has drawn several issues which Respondent contends are not properly before this Court because they were not raised in the petition for certiorari. These issues which should not be considered are questions going to the existence of the Employer's good faith in discharging the two employees involved in this case, Harmon and Davis, and the question of whether the Board might properly order reinstatement of the two employees assuming that they were lawfully discharged. Respondent believes that because these questions were not raised in the petition for certiorari, Petitioner is precluded from raising them now.

II. The Respondent contends that its discharge of the two employees in question did not constitute a violation of Section 8 (a)(3) of the Act. This is for two reasons:

A. The Respondent believes that motivation is an essential element of a violation of Section 8 (a)(3) of the Act. The employer may discharge an employee for any reason or for no reason at all so long as he is not motivated by the employee's engagement in protected activities. In the instant case, it is contended a motivation completely aside from unionism motivated the employer. The mere fact that the employer was erroneous in the reasons behind his motivation does not destroy it. Even so, the employer was reasonable in his mistaken belief. But this is not the question, the question is what the employer believed. Because the employer acted because of the mistaken belief, he was not guided by a discriminatory motive.

B. Respondent contends that the cases relied upon by the Board for the proposition that a good faith but mistaken belief will not be a defense to a Section 8 (a)(3) charge are inapplicable to the present situation because they are based on the Act's solicitude for the right to strike. The Respondent believes that the distinction rests on the commands of Sections 2 (3) and 13 of the Act. The distinction has been recognized by the Board itself and by the courts applying the rule relied upon by the Board.

III. Respondent urges that its conduct in discharging the employees in the good faith belief that they either made or condoned threats to dynamite the Respondent's plant cannot be the basis for a Section 8 (a)(1) charge independent of any violation of Section 8 (a)(3). This is for two reasons:

A. The employer having to bear the risk of the truth or falsity of the allegations must make the decision as to whether he is to bear this risk. This is a part of the "business judgment" doctrine. This doctrine, although alluded to by the Board, has either been misconstrued or ignored by it. The Board's analysis fails to understand the basic nature of Section 8 (a)(1). Section 8 (a)(1) contemplates something more than a mere encouragement or discouragement of union status. The present case is at the most a mere showing of some possible foreseeable discouragement of union status and as such does not constitute interference, restraint or coercion.

B. The Respondent believes that the Board in finding a violation of Section 8 (a)(1) exceeded its power to draw reasonable inferences by, in this case, basing its finding of a violation, on an inference based on an inference which was in turn based on a third inference. Further, Respondent points out that a mistaken belief on the part of employees as to Respondent's motivation will not, as contended by the Board, make an otherwise lawful discharge unlawful. But aside from this, the Board's inferences are not supported by any evidence.

IV. Finally, Respondent urges that this Court has recognized that the employer has a right to undertake action for the defense of his legitimate interests so long as this right is not used retalitorily to injure the union. In exercising this right, the employer may act upon the facts as they appear at the time, rather than as they turn out to be with the benefit of hindsight. In the instant case, Respondent contends the safety of the plant and of the other employees was such a legitimate interest which Respondent was justified in protecting without penalty.

ARGUMENT.

POINT ONE.

THE QUESTION OF GOOD FAITH OR OF THE POWER OF THE BOARD TO ORDER REINSTATEMENT AS A REMEDY FOR A LAYOFF IN SPITE OF A LAWFUL DISCHARGE IS NOT BEFORE THIS COURT.

Preliminarily, several brief points should be made before entering into the argument proper. These points deal with the question of whether certain issues injected into this case in Petitioner's Brief, not raised in the petition for certiorari may not be considered.

Beginning on page 31 of its Brief, the Board argues that "the facts accepted as true by the Court of Appeals in this case would not, under any proper view, constitute 'good faith'. In addition, beginning on page 32 of its Brief, the Board argues that:

> "The Court of Appeals erred in assuming that respondent's 'motivation was the belief that men had threatened to dynamite property; the intent was to rid the plant of those from where the threat was believed to have emanated.' (R. 214.) This assumption was directly contrary to the Board's findings of fact that the allegations of misconduct were merely a pretext for discharging the men because of their union activity."

In its petition for certiorari, these points were specifically waived by the Board. On page 6 of its Petition in footnote 6, referring to the Court's conclusion that the Company in "good faith" thought Harmon and Davis to have engaged in misconduct, the Board states:

> "The Court thus in effect rejected the Board's alternative finding that misconduct was only a pretext for the discharges (see supra, p. 4). The propriety of this action is not questioned here."

This Court has long held that questions not raised in the petition for certiorari are not before the Court. In *Trailmobile Co. v. Whirls*, 331 U.S. 40, 48 (1947), this Court stated:

> "At the outset, it is important, in view of certain questions which have been injected beyond the issues presented for decision, to state explicitly what is not before us. In the first place, we are not required to determine whether the class suit in the state courts constituted an adjudication of the rights of the parties involved in this litigation. That question was presented to the District Court and the Circuit Court of Appeals. Both determined it adversely to petitioners, but

no error was assigned to this ruling in the petition for certiorari. The question is therefore not before this Court and we express no opinion concerning it."

It is submitted, therefore, that the question of the Respondent's good faith or whether this was but a pretext is not now properly before this Court.

Similarly, in reference to the argument made beginning on page 33 of the Board's brief that the Board may properly order reinstatement of employees improperly laid off and who are subsequently discharged as the result of a good faith but mistaken belief that they have engaged in improper conduct, it is again noted that this is a point not properly before this Court.

Nowhere in the petition for certiorari does the Board raise the question of whether the Board's remedy was the appropriate one for the previous discriminatory layoff. The only question raised was whether discharge because of a good faith but mistaken belief of improper activities constitutes a violation of the National Labor Relations Act when the employer knows that the employees are engaged in solicitation for union membership. See Petitioner's petition for certiorari, page 2. Nowhere in the petition does the Board raise the question of the construction of Section 10 (c) of the Act.

It is submitted, therefore, that the questions of "good faith" and of the power of the Board to order reinstatement in spite of the subsequent discharge

are not properly before this Court. See *J. I. Case Co. v. Borak*, ... U.S. ...., 12 L.ed. 2d 423 (1964); and *Namet v. United States*, 373 U.S. 179, 190 (1963).

POINT TWO.

THE COURT OF APPEALS PROPERLY HELD THAT WHERE AN EMPLOYEE IS DISCHARGED AS A RESULT OF A GOOD FAITH BUT MISTAKEN BELIEF OF THE EMPLOYER THAT THE EMPLOYEE HAS ENGAGED IN MISCONDUCT, NO VIOLATION OF SECTION 8 (a)(3) HAS TAKEN PLACE.

A. Motive Is An Essential Element Of A Violation Of Section 8 (a)(3).

As this Court pointed out in *Radio Officers' Union, etc. v. National Labor Relations Board*, 347 U.S. 17, 43 (1954),

> "The relevance of the motivation of the employer in such discrimination has been consistently recognized under both § 8 (a)(3) and its predecessor."

The test of whether Section 8 (a)(3) has been violated is the "true purpose" or "real motive" of the employer.[1] For, as noted by Mr. Justice Harlan:

> "In general, this court has assumed that a finding of a violation of § 8 (a)(3) or § 8 (b)(2) requires an affirmative showing of a *motivation*

1 *Local 357, I.B. of T.,C.,W. & H. v. National Labor Relations Board*, 365 U.S. 667, 675 (1961).

of encouraging or discouraging union status or activity."[2]

Hence, it has been held that so long as there is no discrimination because of union activities, an employer may discharge or refuse to re-employ one of his employees for a reason, just or unjust,[3] good or bad,[4] reasonable or unreasonable,[5] fair or unfair,[6] or no reason at all.[7] In short, "the essential element of discrimination in its legal context is the mental process of the alleged discrimination."[8] Of course, this is not to be confused with the rule that a good business reason never justifies unlawful discrimination. See *Allis-Chalmers Mfg. Co. v. National Labor Relations Board*, 162 F.2d 435 (7th Cir., 1947). The distinction lies in that, in one case, the employer acts from a motive aside from unionism, and in the other, he acts because of union membership but "believes he has good business reasons to justify his discrimination." *Allis-Chalmers, supra*, 162 F.2d at 440.

But, the Petitioner urges, where the reason is based on a mistaken reason, proof of motive is not needed;

---

[2] Ibid page 680 concurring opinion.

[3] *National Labor Relations Board v. Adkins Transfer Co.*, 226 F.2d 324, 328 (6th Cir., 1955).

[4] *National Labor Relations Board v. United Parcel Service, Inc.*, 317 F.2d 912 (1st Cir., 1963); *National Labor Relations Board v. McGahey*, 233 F.2d 406 (5th Cir., 1956).

[5] *National Labor Relations Board v. Standard Coil Products Co.*, 224 F.2d 465, 470, (1st Cir., 1955), cert. denied, 350 U.S. 902.

[6] *Underwood Machinery Co.*, 74 N.L.R.B. 641 (1947), affirmed 179 F.2d 118 (1st Cir., 1949).

[7] *National Labor Relations Board v. United Parcel Service, Inc., supra; National Labor Relations Board v. McGahey, supra; National Labor Relations Board v. Condenser Corp.*, 128 F.2d 67, 75 (3rd Cir., 1942).

[8] An American Legal Dilemma—Proof of Discrimination, 17 University of Chicago Law Review 107, 109.

it may be presumed, Petitioner's argument is based on the exception that "specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership."[9] This exception is a narrow one.[10] It has been applied, for instance, to "no-solicitation" rules,[11] disparte wage treatment of employees based solely on union membership status,[12] and "super-seniority granted to non-strikers."[13] In each of these, the employer's act, by its very terms, had a destructive impact upon union activity and in reference to intent, the thing spoke for itself. In *Erie Resister*,[14] for instance, the Court stated:

> ". . . super-seniority by its very terms operates to discriminate between strikers and non-strikers, both during and after a strike, and its destructive impact upon the strike and union activity cannot be doubted."

In the instant case, not only is there no "destructive impact" upon union activity, but no distinction at all has been made by the employer based on unionism or non-unionism. Indeed, it has been specifically found that the discriminatory motive did not exist; the discharges were based on the mistaken but "good faith" belief that the employees in question had threatened to blow up the employer's sand silo.

---

9 *Radio Officers' Union, supra*, at 45.
10 *Local 357, supra*, p. 680, concurring opinion.
11 *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793 (1945).
12 *Radio Officers' Union, supra.*
13 *National Labor Relations Board v. Erie Resister Corp.*, 373 U.S. 221 (1963).
14 *National Labor Relations Board v. Erie Resister Corp., supra*, at 231.

The Board attempts to draw a distinction between "honest belief" and "good faith" arguing, perhaps, that really all Respondent had was an "honest belief" and not "good faith."[15] This, of course, ignores the essential element, motive, and as previously indicated, it matters not whether the motive is reasonable or unreasonable. But even so, it cannot really be contested that Respondent's belief was reasonable. The following facts might be considered in determining its reasonableness: (1) There were only two parties who knew the truth of the allegation, (a) Pate and (b) Davis and Harmon. Respondent took a sworn statement from Pate. What more could have been done? Should Respondent have asked Harmon and Davis; and if so, what answer could Respondent expect? Yes, I threatened to blow up your sand silo. Of course, Respondent could have waited to see whether they would blow up the silo. Had Respondent questioned Harmon and Davis, it seems highly probable that the Board would have entertained a charge alleging a violation of Section 8 (a)(1) of the Act. (2) But in addition to the sworn statement, Respondent knew that Harmon was skilled in the use of dynamite; he had helped to clean out the inside of a mixer truck with dynamite before; (3) further, there were "rumors" going about that Harmon and Davis had threatened to blow up the silo; and (4) in addition to this, even after the letter of dismissal had been sent, Davis and Harmon never came forward to give their side of the story. While this may not be "legal evidence"

[15] Petitioner's Brief, p. 32.

as to the truth of the accusation, it certainly goes to show the reasonableness of the Respondent's belief. Opposite this there is no direct evidence to show that this was not the Respondent's belief. Indeed, it was found by both the Trial Examiner and the Court of Appeals that this was a good faith belief. In circumstances such as these, going to the credibility of a witness, the ruling of the Trial Examiner is to be given some weight.[16] As the late Learned Hand once stated:

> "'Good faith' is one form of credibility; it means that the motive that actuated the conduct in question was in fact what the actor ascribes it to be: i.e., that what he gives as his motive was in truth his motive."[17]

From this may be seen that reasonableness does not go to good faith. The question is "what the employer believed and not whether the belief was reasonable."[18] But even so, the question of "good faith" is not before this Court. See Point I, *supra*.

Since the employer acted on the basis of a good faith but mistaken belief and was not motivated to discriminate because of union activities, no Section 8 (a)(3) violation has occurred. The Courts of Appeal

---

[16] *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951).
[17] *National Labor Relations Board v. James Thompson & Co.*, 208 F.2d 743, 745 (2nd Cir. 1953).
[18] *Raytheon Company v. National Labor Relations Board*, 326 F.2d 471, 475 (1st Cir., 1964).

of three circuits under similar circumstances have so held.[19]

B. The Rule Of Mistaken Belief Applied In Cases Involving The Reinstatement Of Strikers Is Inapplicable To The Present Situation.

As authority for the proposition that a good faith but mistaken belief will not be a defense to a Section 8 (a)(3) charge where it affirmatively appears that misconduct for which the employee is discharged did not occur, the Board cites *National Labor Relations Board v. Industrial Cotton Mills*, 208 F.2d 87 (4th Cir., 1953) and *Cusano v. National Labor Relations Board*, 190 F.2d 898 (3rd Cir., 1951). Each of these cases involved the question of a discharge of a striker. The basis of the decision in those cases, Respondent submits, are Sections 2 (3) and 13 of the Act. For as pointed out by the Court in *Industrial Cotton:*

> "Section 2 (3) of the Act preserves to strikers their status of employees and Section 13 provides 'nothing in this Act, except as specifically provided for herein, shall be construed so as * * * to interfere with or impede or diminish in any way the right to strike'." 208 F.2d at 91.

The holding of the case was simple:

> ". . . . there is a right guaranteed by the Act—the right of an employee to reinstatement after

[19] *National Labor Relations Board v. Prince Macaroni Mfg. Co.*, 329 F.2d 803 (1st Cir., 1964); *National Labor Relations Board v. John S. Swift Company*, 277 F.2d 641, 645 (7th Cir., 1960); *National Labor Relations Board v. Kaye*, 272 F.2d 112, 114 (7th Cir., 1959); *Rubin Bros. Footwear v. National Labor Relations Board*, 203 F.2d 486 (5th Cir. 1953).

> a strike. That right is not forfeited by the honest but mistaken belief of the employer that the employee has been guilty of strike misconduct, *not misconduct apart from, and having no relation to the strike.*" (Emphasis supplied.) 208 F.2d at 92.

As pointed out by this Court in *National Labor Relations Board v. Erie Resister Corp.*:

> "Section 13 makes clear that although the strike weapon is not an unqualified right, nothing in the Act except as specifically provided is to be construed to interfere with this means of redress, H. R. Conf. Rep. No. 510, 80th Cong, 1st Sess 59, and § 2 (3) preserves to strikers their unfilled positions and status as employees during the pendency of a strike. S. Rep. No. 513, 74th Cong, 1st Sess 6." (Footnotes omitted.) 373 U.S. at 233.

It appears clear that Congress has intended a "solicitude for the right to strike." *Ibid.*, 373 U.S. at 233-234. Congress has constantly maintained the "integrity of the strike weapon." *Ibid.*, 373 U.S. at 234. Section 13 commands that "the right to strike is to be given a generous interpretation within the scope of the Labor Act." *Ibid.*, 373 U.S. at 234-235. Citing, among others, the *Cusano* case, this Court has noted:

> "The courts have likewise repeatedly recognized and effectuated the strong interest of federal labor policy in the legitimate use of the strike." *Ibid.*, 373 U.S. at 235.

That this is the rationale behind the Board's rule is clearly revealed in *Bonnar Vawter, Inc.*, 129 N.L.R.B.

127 (1960), affirmed 289 F.2d 133 (1st Cir., 1961), which involved the honest but mistaken belief that a striker had placed nails in the employer's driveway. There it was stated:

> "The Board and the courts have been in clear agreement that strike activity protected by Section 7, although it may involve threats, name calling, profanity, and fisticuffs, will not subject the striker to discharge or disqualify him for reinstatement. Even where the action of the strikers involves coercion and restraint and therefore is removed from the shield of Section 7, the Board has been enjoined to consider whether or not reinstatement would effectuate the policies of the Act." 129 N.L.R.B. at 140.

The Board has itself recognized the distinction between an honest but mistaken belief as to strike activities and a mistaken belief as to other concerted activities. Compare *Underwood Machinery Co.*, 74 N.L.R.B. 641 (1947), affirmed 179 F.2d 118 (1st Cir., 1949), involving a mistaken belief as to the existence of a union sponsored slowdown and *Midcontinent Petroleum Co.*, 54 N.L.R.B. 912 (1944), involving a strike situation.

But, aside from this, parenthetically it is noted that the discharge should be upheld. As noted by the Court in *Industrial Cotton, supra,* upon which Petitioner relies, when the mistaken belief is as to the commission of a felony by the discharged employee, reinstatement may not be ordered, 208 F.2d at 90. It is to be noted

that under Florida law the threat to dynamite the property of any person with the intent to damage is a felony punishable by imprisonment in the state penitentiary for twenty years.[20]

To summarize, the cases on which Petitioner relies involve either strike situations in which cases effect must be given to the provisions of Sections 2 (3) and 13 of the Act, or situations in which the employer's action was based on union membership (*Erie Resister*, for example). These cases do not control the problem now confronting the Court. Respondent's action did not violate the Act because for there to be a violation of Section 8 (a)(3), it is essential that the employer's motivation be to discriminate for the purpose of encouraging or discouraging membership in a labor organization.

Thus, a discharge motivated by a good faith but mistaken belief that an employer has engaged in misconduct (which, if true, admittedly is sufficient cause for discharge) unrelated to strike activities does not constitute an unfair labor practice under Section 8 (a)(3) of the Act.

---

[20] Florida Statutes Section 790.162 (1963): "790.162. Threat to throw, place or discharge bomb or other deadly explosives, felony; penalty. It shall be unlawful for any person to threaten to throw, place, or discharge any bomb, dynamite, or other deadly explosive with intent to do bodily harm to any person or with intent to do damage to any property of any person and any person convicted thereof shall be guilty of a felony and punished by imprisonment in the state penitentiary for not more than twenty years."

POINT THREE.

A DISCHARGE BASED ON A GOOD FAITH BUT MISTAKEN BELIEF THAT AN EMPLOYEE HAS ENGAGED IN MISCONDUCT DOES NOT CONSTITUTE A VIOLATION OF SECTION 8 (a)(1).

A. The Board's Finding of a Section 8 (a)(1) Violation Interferes with Respondent's Right to Make a Reasonable Business Judgment.

Petitioner contends that a discharge of an employee based on a good faith but mistaken belief that the employee had committed an act of misconduct in the course of protected activity constitutes a violation of Section 8 (a)(1) if, at the time, the employer knew the employee was engaged in such activity even though the employer had no discriminatory motive [Brief pp. 6, 7].

This is not the law, nor has it ever been. Until now it appeared that:

> "The Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees."[21]

The Board contends that in a situation in which employees might believe that a discharge was motivated by anti-union animus, the discharge will interfere with employee rights under Section 7 because "employees would very likely be more hesitant to engage in future

---

[21] *Associated Press v. National Labor Relations Board*, 301 U.S. 103, 132 (1937).

protected activity in a plant where one of their members has mistakenly been discharged for alleged misconduct committed in the cause of protected activity." This argument, of course, ignores the rule that membership in a union does not guarantee the member against discharge.[22]

But more important, the rule proposed by the Board impinges on the "business judgment" of the employer. For as the Board concedes "employer action which actually tends to interfere with concerted activity is lawful if it can be shown both that the employer was innocent of anti-union bias and also that he was motivated by business considerations which, on balance, prevail over the employee rights as involved" [Brief p. 16]. The Board then equates "business judgment" with "question of judgment closely touching the proper operation of the plant", such as an employee's efficiency [Brief p. 17]. This ignores, however, the true nature of business judgment. This is the determination of what risks the employer is willing to bear relevant to any given situation. This includes not only whether the employer is willing to risk his money on a new venture, but whether the employer is willing to risk employing an employee who, although satisfactory in all respects, scored low on an aptitude test. For as indicated in *National Labor Relations Board v. United Parcel Service, Inc.*, 317 F.2d 912, 914 (1st Cir., 1963):

---

[22] *Rubin Bros. Footwear v. National Labor Relations Board*, 203 F.2d 486, 488 (5th Cir., 1953); *National Labor Relations Board v. Mylon-Sparta Co.*, 166 F.2d 485, 490-91 (6th Cir. 1948).

> "Whatever, as an abstract proposition, we might think of the wisdom or the 'business judgment' of discharging an employee because of his low score on a twelve minute aptitude test—some fourteen months after the event—and indeed after the employee has in the day-to-day operation of the company's business proven himself satisfactory, nonetheless we must respect the right of a company to make just such a decision. Cf., N.L.R.B. v. New England Web, Inc., 309 F.2d 696 (1st Cir. 1962); National Labor Relations Board v. Houston Chronicle Pub. Co., 211 F.2d 848, 855 (5th Cir. 1954)."

Similarly, in the instant case, it should be the employer who should decide whether he is willing to take the risk of the accusation being true, for it is the employer, not the Board, who will bear the ultimate risk of its truth or falsity.

The Board's analysis also fails to understand the basic nature of Section 8 (a)(1). Section 8 (a)(1), while not requiring a motive to interfere,[23] contemplates an element of a threat or promise as a part of an overall pattern tending to restrain or coerce.[24] It includes intimidation, but does not amount to duress.[25] However, it is certainly more than encouragement or discouragement of union status. For as indicated by Justice Harlan:

---

[23] *National Labor Relations Board v. Illinois Tool Works*, 153 F.2d 811 (7th Cir., 1946).
[24] *National Labor Relations Board v. McCatron*, 216 F.2d 212 (9th Cir., 1954), cert. denied 348 U.S. 943.
[25] *Rapid-Roller Co. v. National Labor Relations Board*, 126 F.2d 452 (7th Cir. 1942), cert. denied 317 U.S. 650.

> ". . . a mere showing of foreseeable encouragement of union status is not a sufficient basis for finding a violation of the statute. It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects."[26]

In this case, however, the Board has equated discouragement with interference, restraint, and coercion, now making unlawful that which was formerly permitted.

It is submitted, therefore, that no violation of Section 8 (a)(1) was committed in that the Employer's discharge of Davis and Harmon was a "reasonable business judgment", reserved to it, and that even if not a business judgment, whatever effect it may have on union activities would be less than interference, restraint, or coercion of employees in the exercise of their Section 7 rights.

B. The Board Exceeded its Power to Draw Reasonable Inferences in Finding of a Violation of Section 8 (a)(1).

As a basis for finding a violation of Section 8 (a)(1) the Board argues[27] that an employee discharged on the basis of a mistaken belief might conclude that he

---

[26] *Local 357, I.B. of T,C,W, & H. v. National Labor Relations Board*, 365 U.S. 667, 679 (concurring opinion).

[27] Brief page 15.

was discharged for engaging in union activity. From this the Board infers the discharged employee's fellow workers would believe this version rather than the employer's. Based on this, the Board further infers that the employees would "likely be more hesitant to engage in future protected activity." From this the Board concludes that the discharge is a Section 8 (a)(1) violation. Upon analysis we find that in reality, this conclusion is based on three inferences; one upon the other: (1) the discharged employee will believe that he was discharged for union activity rather than that he was fired as a result of a mistake; (2) the fellow workers will believe and accept his belief that he was discharged for union activities rather than the reason given by their employer; and (3) the fellow workers will then be more hesitant to engage in concerted activities. While this Court has held that the power to make reasonable inferences based on evidence rests in the Board,[28] it is a well known rule of evidence that inferences may not be based on inferences; presumptions on presumptions. It is submitted that this rule applies to the Board's fact finding powers.[29]

But even if such inferences could be built, one upon the other, the Respondent's actions would not constitute a violation of Section 8 (a)(1). In *National Labor Relations Board v. McCatron, supra*, the situation envisioned by the Board actually occurred. An employee who had been engaged in union activities was

[28] *Radio Officers' Union, supra*, 347 U.S. at 49.
[29] *National Labor Relations Board v. Ray Smith Transport Co.*, 193 F.2d 142, 146 (5th Cir., 1951).

discharged for actual misconduct. His fellow employees mistakenly, but in "good faith," believed that the discharge was for the union activity and they accordingly struck. Some of the fellow workers testified that they believed that they too might be discharged for engaging in union activities. The Court noted that the strike under such circumstances was an economic strike and not an unfair labor practice strike as it would have been had the employer been unlawfully motivated.

Similarly, in the instant case, the employer without an unlawful motive discharged employees. Just as in *McCatron*, the mere fact that employees might believe the discharges were unlawfully motivated does not cause the discharges to become an unfair labor practice.

Aside from this, it is to be noted that there was no evidence introduced at all to show that the employees in the instant case did believe or even tended to believe that the employer was motivated by anti-union animus.

POINT FOUR.

THERE IS AN INDUSTRIAL RIGHT OF SELF-DEFENSE.

We have shown that the Court of Appeals decision in this case was correct, there being no improper motivation on the part of the employer and the discharges not constituting a violation of Section 8 (a)(1) of the Act. In addition, it is appropriate to make one

brief alternative argument, peculiar to the facts of this case.

On page 29 of its Brief, the Board invites an analogy with the law of torts such as battery. It is submitted that such an analogy may be prope.ly made, but such an analogy should be limited to mistakes of fact going to intent or motivation. In other words, for instance, a mistake of identity would be in this case, as in the case of a tort, no defense if the actor intended that which he did, i.e., discharged someone for union activities or hit someone in the nose. Rather, the analogy should be to cases in which the actor took action as a result of that which he believed the other person was planning to do, such as in cases of self defense.

In such cases, it appears clear that a mistake of fact may be a defense.[30] So, too, should the employer have a right to undertake action for the defense of his legitimate interests when he, in good faith, believes that it be in danger so long as it is not used retaliatorily to injure the union. This right to protect legitimate interest was recognized by this Court in *National Labor Relations Board v. Truck Drivers Local Union*, 353 U.S. 87 (1957), called the *Buffalo Linen* case. As in the case of self defense when one may act upon the facts as they appear at the time, so should the employer be justified in acting upon the facts as they appear at the time. Just as the actor in the tort case is not required to investigate further to see if the

[30] 1 Harper & James *The Law of Torts*, 239.

gun is really loaded, the Respondent should be permitted to rely on the facts as they reasonably appear.

It is submitted that there is a right of "industrial self defense" under which an employer may take reasonable actions to protect his legitimate interests. In this case the legitimate interests were the protection of the plant and the lives of the employees.

CONCLUSION.

For the foregoing reasons, the judgment of the Court below should be affirmed.

Respectfully submitted,

By ERLE PHILLIPS,

ERLE PHILLIPS,
26 Pryor Street, N.E.,
Atlanta, Georgia 30303,

GEOFFREY B. DOBSON,
26 Pryor Street, N.E.,
Atlanta, Georgia 30303,
Attorneys for Respondent.

CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that I have this ...1. day of September, 1964, caused a copy of the foregoing Brief for the Respondent to be furnished to the following individuals by depositing same in the U. S. Mail, Air Mail, postage prepaid:

Mr. Archibald Cox,
Solicitor General,
United States Department of Labor,
Department of Labor Building,
14th Street & Constitution Avenue,
Washington 25, D. C.,

Mr. Arnold Ordman, General Counsel,
National Labor Relations Board,
1717 Pennsylvania Avenue, N.W.,
Washington, D. C. 20570.

(S.) ERLE PHILLIPS,
Of Counsel.

APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 et seq.) are as follows:

Sec. 2. When used in this Act—

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained substantially equivalent employment,

* * * *

Sec. 7 Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all of such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)

Sec. 8(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain,

or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *

Sec. 10 * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

* * * *

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.